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No. 06-

IN THE

Supreme Court of the United States

STEPHANIE TIPPIE,

Petitioner,

v.

SPACELABS MEDICAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit affirmed the district court's grant of Spacelabs' Motion for Summary Judgment in an employment discrimination claim filed by Tippie. Tippie claims that Spacelabs discriminated against her because of her gender, national origin and race when it terminated her position of Key Account Manager and failed to hire her for two available positions that were awarded to two male Argentinian individuals. The Eleventh Circuit affirmed the summary judgment order notwithstanding that the decision-maker admitted to facts from which a trier of fact can conclude that the decision-maker did not research the competing qualifications of the candidates in order to push through the candidates he had been predisposed to select. An employer is not entitled to an automatic application of the "honest belief" rule when the evidence shows that the decision-maker did not make a decision that was reasonably based on particularized facts. Permitting application of the rule under such circumstances insulates employers from attacks on their credibility and impairs a plaintiff's ability to fully oppose a motion for summary judgment as her ability to demonstrate pretext is severely limited. A conflict exists among the Eleventh, Sixth, and Seventh Circuits as to the circumstances that are appropriate for the application of the "honest belief" rule, and other Circuits have inconsistently applied such rule.

The Eleventh Circuit further affirmed the District Court's grant of summary judgment to Spacelabs on Tippie's race discrimination claim under Section 1981 finding that Tippie's discrimination claim was not cognizable under Section 1981 despite evidence of comments by the decision-maker that implicated both national origin and race.

Two questions are presented:

1. Can an employer avail itself of the honest belief defense on a motion for summary judgment when the facts show that the belief had no legitimate factual basis and was based on the decision-maker's ignorance?

2. Does national origin discrimination by its nature implicate race discrimination thereby making such claim cognizable under Section 1981?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinion Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	13
Reasons for Granting the Petition	18
I. Review Is Warranted To Resolve A Conflict Concerning Application Of The Honest Belief Rule In The Summary Judgment Context	20
II. Review Is Warranted To Resolve A Conflict Concerning The Applicability Of Section 1981 To Employment Discrimination Cases That Implicate National Origin Discrimination	28
Conclusion	30

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 23

Balmer v. HCA, Inc., 423 F.3d 606 (6th Cir. 2005) .. 26

Bisciglia v. Kenosha Unified Sch. Dist. No. 1, 45 F.3d 223 (7th Cir. 1995) 29

Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999) 27

Celotex Corp. v. Catrett, 477 U.S.317 (1986) 22

Chapman v. AI Transport, 229 F.3d 1012 (11th Cir. 2000) 23, 24, 26, 27

Clark v. Coats & Clark, Inc., 990 F.2d 1217 (11th Cir. 1993) 21

Cooper v. Southern Co., 390 F.3d 695 (11th Cir. 2004) 19, 24, 25

Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379 (10th Cir. 1991) 28

Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354 (11th Cir. 1999) 25

Cited Authorities

	Page
Elrod v. Sears, Roebuck & Co., 939 F.2d 1466 (11th Cir. 1991)	25
Equal Employment Opportunity Commission v. Sears Roebuck and Co., 243 F.3d 846 (4th Cir. 2001)	27
Fischbach v. District of Columbia Dep't of Corrections, 86 F.3d 1180 (D.C. Cir. 1996)	27-28
Flores v. Preferred Technical Group, 182 F.3d 512 (7th Cir. 1999)	26
Gillen v. Fallon Ambulance Service, Inc., 283 F.3d 11 (1st Cir. 2002)	27
Graham v. Richardson, 403 U.S. 365 (1971)	29
Jameson v. Arrow Co., 75 F.3d 1528 (11th Cir. 1996)	21
Kariotis v. Navistar Int'l Trans. Corp., 131 F.3d 672 (7th Cir. 1997)	18, 22, 26, 27
Laxton v. Gap, Inc., 333 F.3d 572 (5th Cir. 2003)	27
Little v. Illinois Dep't of Revenue, 369 F.3d 1007 (7th Cir. 2004)	26
Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987)	29

Cited Authorities

Page

Lowe v. Ala. Power Co., 244 F.3d 1305 (11th Cir. 2001) 25, 26, 28

Magana v. Commonwealth of Northern Mariana Islands, 107 F.3d 1436 (9th Cir. 1997) 29

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 20

Plotke v. White, 405 F.3d 1092 (10th Cir. 2005) ... 27

Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557 (7th Cir. 1987) 26

Reeves v. Sanderson Plumbing, Inc., 120 S. Ct. 2097 (2000) 20, 21, 22, 23

Rojas v. Florida, 285 F.3d 1339 (11th Cir. 2002) .. 25

Russell v. McKinney Hospital Venture, 235 F.3d 219 (5th Cir. 2000) 22

Sagana v. Tenorio, 384 F.3d 731 (9th Cir. 2004) .. 29

Smith v. Chrysler Corporation, 155 F.3d 799 (6th Cir. 1998) 25, 26, 27

St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) 29

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed April 27, 2006 ..... 1a

Appendix B — Final Order Of The United States District Court Southern District Of Florida Granting Motion For Summary Judgment And Closing Case Dated And Filed July 20, 2005 ... 11a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Filed June 1, 2006 ..... 38a

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was unpublished and rendered on April 27, 2006. The Eleventh Circuit affirmed the July 20, 2005 unpublished decision of the United States District Court for the Southern District of Florida. *See* Appendices A and B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Eleventh Circuit's opinion was rendered on April 27, 2006. The Petition for Panel Rehearing was denied on June 1, 2006. *See* Appendix C.

STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 2000e-2.

Unlawful Employment Practices

a) Employer practices

It shall be an unlawful employment practice for an employer—

> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect

his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain

instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive

Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

> **(1)** the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and
>
> **(2)** such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards

of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)

(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin

and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)

(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)

(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to

apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief

was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28.

Title 42 United States Code, Section 1981.

Equal Rights Under the Law.

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

1. Petitioner Stephanie Tippie asserts in this case that Spacelabs, after its acquisition by Instrumentarium, discriminated against her on the basis of her gender, national origin and race when it terminated her position of Key Account Manager and failed to hire her for two available positions that were awarded to two male Argentinian individuals.

Tippie was employed by Spacelabs, Inc. as a Key Account Manager from August 1995 to September 2002. In that role, she managed the distribution channels of her assigned territory and trained the distributor sales force.

During the first six months of her employment at Spacelabs, Tippie was in charge of the Southern Cone of Latin America which included Brazil. In Brazil, Tippie trained distributors on Spacelabs Equipment and Information Systems, and she made presentations in Portunol (Portuguese/Spanish) to physicians and hospital administrators while traveling with Brazilian distributor representatives. Tippie was also very instrumental in the hiring of the Argentinian distributor which contract was finalized after Tippie was transferred from working in the

Southern sales cone. Tippie also made distributor visits to Peru and Chile to begin management of the then in-place distributors. During the remainder of her employment, Tippie was in charge of the Northern Cone of Latin America consisting of Colombia, Venezuela, Ecuador, Central America and the Caribbean. Tippie gave up Venezuela to Facundo Carrillo, the male Argentinian individual that Spacelabs subsequently retained after the company reorganization, approximately during the last year or two of her employment due to the fact that he had less of a sales management work load than her. Tippie is fluent in Spanish and speaks Portunol and has conducted sales seminars in Latin America, including Brazil.

In the fall of 2002, Instrumentarium, a Finnish company, acquired Spacelabs, and the Key Account Managers were eliminated in the company reorganization. However, two positions became available at the time of Tippie's elimination that she was not awarded. Those positions were awarded to two Argentinean males: Mr. Carrillo and Mr. Szmulewicz.

First Available Position-Burdick Product Line Manager

Spacelabs had already decided to retain Carrillo upon news of the reorganization without analysis as to whether he was the most qualified candidate. Indeed, Spacelabs made room to retain its Hispanic or non-American female employees and Hispanic or non-American male employees in the reorganization. In an e-mail by its Human Resources Representative Denisse Garcia dated August 20, 2002, the plan for each affected employee was outlined that showed that provisions were made for all affected employees' future employment except Tippie. Carrillo's future in the company was secured as it stated that Carrillo was pending based on the "future sales channel for the Burdick Product Line". The e-mail shows that Tippie was not even considered for that Burdick Product Line possibility as was Carrillo.

Stephanie Tippie, Sylvia Heirro-Molina, Santiago Acosta, Augusto De Mello, Facundo Carrillo, and Stephan Nordman were all to be released, but Tippie was the only one actually released because Turtola found a job for everyone else. Stephen Nordmann could have stayed but he chose not to.

Moreover, Carrillo was an independent contractor with less seniority than Tippie. Company policy dictated preference for employees with seniority in a "layoff".

Borden, a Human Resources Representative, noticed this anomaly and asked Turtola why a contractor was being retained and not a U.S. employee. In an e-mail dated 8/24/02, Turtola "promised to look carefully into their competencies to run regionally the Burdick line."

Turtola responded by e-mail to Borden with a purported comparison of the candidates' qualifications for the Burdick Product Line Manager position that attempted to justify his reasons for his selection of Carrillo.

His e-mail comparison of the candidates stated that Tippie did not have the technical/engineering perspective and understanding of the medical equipment, that she speaks some basic Spanish but is "not native", does not have any command of the Portuguese language, and her strength was in sales and not distributor management and pro-active channel-to-market development.

At deposition, Turtola admitted that his selection was un-researched. He admitted that he did not look at Tippie's background and never did he provide Borden the supporting documents that would "*prove* that a consistent and equitable process was employed" as Borden had requested in connection with the reorganization process. Borden testified that no one fact-checked Turtola, and there was no application of the selection criteria. Turtola admitted that had he done what Ms. Borden asked him to do, he would have discovered Tippie's

qualifications because "it might have popped up from the material".

Tippie's job description demonstrated that she indeed managed distributors in Latin America, Tippie trained Carrillo in Argentina when he was hired, and Tippie's performance was "excellent". Tippie's career history was working in Latin America, including teaching sales seminars in Brazil. Tippie is fluent in Spanish and had no difficulty communicating with Portuguese clients in Portunol. Tippie took a two-year course at the Latin American Institute from 1968 to 1970 and graduated with a degree in translating and interpreting from Spanish to English and English to Spanish. Turtola stated that Carrillo was "fluent in Portuguese", however Carrillo's resume stated he was "conversational".

Turtola admitted at deposition that both Tippie and Carrillo had the same experience running distributor networks, but later, in his Summary Judgment Affidavit, stated that "she never worked directly for or ran a distributor in Latin America". Tippie also obtained an Associates Degree in Applied Science majoring in respiratory therapy, reflecting a technical and clinical knowledge of medical equipment and application, especially cardiac equipment.

Second Position-Product Manager-Anesthesia & Ventilation

In July 2002, Spacelabs was already recruiting an individual from Argentina, Mr. Jorge Szmulewicz, to occupy a new Product Manager- Anesthesia & Ventilation position through the H-1B Visa employer sponsorship process.

Szmulewicz, an Argentinian national who did business with Datex-Ohmeda in Argentina, was interested in moving to the United States. He contacted Mr. Trujillo of Datex-Ohmeda in July 2002, sent his resume, and then spoke with Turtola. On September 10 or 15, 2002, while Tippie was being laid off,

Turtola met with Szmulewicz at a bar for one hour and offered Szmulewicz the Product Manager position the following month.

In October, 2002, Spacelabs' Operations and Marketing Communications Manager, under Turtola's behest, was working on "fast tracking" Szmulewicz's H1 Visa. Spacelabs even represented to the United States Government that it was actively recruiting U.S. workers when the job had already been offered to Szmulewicz.

Szmulewicz's position was a "Sales Manager" level position, a position Tippie, a U.S. based employee, was more than qualified to occupy. Spacelabs' attempt to characterize the position as one requiring a special technical background was undermined by its own job description for that position and the testimony of Szmulewicz who stated that as a Product Manager, Anesthesia & Ventilation, he did not design equipment, he did not build equipment, and he did not report to an engineer, but rather to Turtola who was head of marketing and who happened to be an engineer. There was an engineering department and no one in the engineering department was in Szmulewicz's chain of command. There was a factory troubleshoot number for product support and the number was not Szmulewicz's number. Although Szmulewicz denied having a sales quota, he did admit to having a bonus plan.

The job description for Szmulewicz's position entailed the responsibilities Tippie already had such as working closing with upstream marketing to ensure adequate marketing exposure within her territory, making suggestions for product changes for better product performance based on client and distributor input, and facilitating product recalls and updates among corporate office, Latin American Service Engineer, and Distributor.

2. Petitioner filed her Complaint in the United States District Court for the Southern District of Florida on April 12,

2004. On July 20, 2005, the District Court granted Spacelabs' Motion for Summary Judgment.

3. Petitioner filed her Notice of Appeal on August 2, 2005. The Eleventh Circuit's decision was entered on April 27, 2006. Petitioner timely filed her Petition for Panel Rehearing on May 18, 2006. On June 1, 2006, the Eleventh Circuit denied the Petition for Panel Rehearing.

REASONS FOR GRANTING THE PETITION

Whether an employer is entitled to invoke the "honest belief" defense on a motion for summary judgment is an important question. The "honest belief" or "good faith belief" defense which provides that "so long as the employer honestly believed in the proffered reason, an employee cannot prove pretext even if the employer's reason in the end is shown to be mistaken, foolish, trivial, or baseless" *Kariotis v. Navistar Int'l Trans. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997) has been utilized by employers in employment discrimination cases to escape liability even when the plaintiff is able to demonstrate that the proffered reason for the complained-of decision turned out to be untrue.

This defense implicates a credibility determination in resolving what the employer "believed" at the time of the adverse employment decision, and plaintiffs have been severely limited in the kind of evidence they may present to establish pretext. They are at an unfair risk of losing a case on summary judgment due to their inability to refute their employer's "belief" since courts are rejecting the evidence plaintiffs provide to establish pretext as insufficient and immaterial. An employer cannot be permitted to utilize such a defense at the summary judgment stage unless it also demonstrates facts that its belief was well-grounded in fact and based on research, not ignorance.

This case illustrates the problem with the rule's application in circumstances where the decision-maker has admitted to facts

that show that he did not research the competing qualifications of the candidates in order to push through the candidates he had been predisposed to select. A belief cannot be found to have been honestly held when no research was done to support it. Such a strict application of the rule encourages employers to take the stance of purposeful ignorance in an employment decision so as not to discover facts that would be in favor of the protected employee.

The Circuit Courts of Appeal are split on the method of application of this defense. The Seventh Circuit adheres to a strict application of the rule, while the Sixth Circuit has criticized the Seventh Circuit and adopted a modified approach to the rule that requires the employer that invokes this defense to show that the decision was based on particularized facts. The Eleventh Circuit has applied the rule inconsistently. In this case, the district court applied the rule strictly, and the Eleventh Circuit did not appreciate the materiality of the fact that the decision maker admitted to not even looking at Tippie's background in deciding that she was not the best candidate for the position. The Eleventh Circuit affirmed the district court on the grounds that a plaintiff asserting superior qualifications as evidence of pretext will only be successful if the disparities in qualifications are of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question", citing *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004) (App. A at 8-9), grounds that were inapplicable to a situation that reveals that the selection was tainted from the start, as the employer had expressed its preference for the person without conducting a legitimate comparison.

Review of this case is essential to stop the erosion of the protections afforded by Title VII through summary judgment procedure. Summary judgment is so routinely utilized in employment discrimination cases that even issues that implicate

credibility assessments are escaping scrutiny. The honest belief or good faith belief defense is indicative of this problem and permits employers to circumvent this Court's holding in *Reeves v. Sanderson Plumbing, Inc.*, 120 S. Ct. 2097 (2000) that cautioned courts not to substitute their judgment for that of the jury and not to unduly restrict a plaintiff's circumstantial case of discrimination.

Review of this case is also warranted to ensure uniformity in the interpretation of "race" so that all appropriate discrimination claims receive Section 1981 protection.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING APPLICATION OF THE HONEST BELIEF RULE IN THE SUMMARY JUDGMENT CONTEXT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2, prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. In 1973, this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) articulated the now familiar standard that is utilized to analyze employment discrimination cases that are based on circumstantial evidence. Under this standard, a plaintiff must establish that she is a member of a protected class, qualified for the position, subject to an adverse employment action, and a person not of the protected class was treated more favorably. Once a plaintiff establishes this *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse decision. Once the employer meets this burden, the burden shifts to the plaintiff to show that the employer's proffered reason is pretextual.

In a reduction-in-force context, as is this case, a plaintiff establishes a *prima facie* case of discrimination by showing (1) that she was in a protected group and was adversely affected by an employment decision, (2) that she was qualified for her

current position or to assume another position at the time of discharge, and (3) evidence by which a fact finder could reasonably conclude that the employer intended to discriminate on the basis of [race, gender, national origin] in reaching that decision. *Jameson v. Arrow Co.*, 75 F.3d 1528, 1532 (11th Cir. 1996).

Once the plaintiff establishes her *prima facie* case, the burden of production then shifts to the employer, who must articulate at least one legitimate, non-discriminatory reason for discharging plaintiff. If the employer does so, the plaintiff then must show that the employer's proffered reason is pretextual. A plaintiff can do so by showing that a discriminatory reason more likely than not motivated the employer's decision, or by discrediting the employer's proffered explanation. *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1218 (11th Cir. 1993).

In *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000), this Court resolved the confusion that existed among the Circuits over the type of evidence that a plaintiff must demonstrate as to pretext. Some circuits had utilized the "pretext-plus" standard that required plaintiffs to not only demonstrate that the employer's reason was false but also provide other evidence of discrimination. This Court rejected the "pretext-plus" standard and held that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination." 530 U.S. 147, 120 S. Ct. 2108. A plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. 530 U.S. 147-48, 120 S. Ct. 2109. As such, *Reeves* instructed courts not to substitute their judgment for that of the jury and not to unduly restrict a plaintiff's circumstantial case of discrimination.

See Russell v. McKinney Hospital Venture, 235 F.3d 219, 223 (5th Cir. 2000).

Despite this Court's instruction in *Reeves*, plaintiffs continue to be restricted in the kind of evidence that they may present to establish a circumstantial case of discrimination. Even where plaintiffs have been able to show that the employer's proffered justification for the employment decision was not true, employers have responded with the argument, and courts have accepted, that as long as the employer "believed" the reason to be true, the plaintiffs could not establish pretext and could not survive summary judgment.

This defense, known as the "honest belief" or "good faith belief" rule, provides that "so long as the employer honestly believed in the proffered reason, an employee cannot prove pretext even if the employer's reason in the end is shown to be mistaken, foolish, trivial, or baseless". *See Kariotis v. Navistar Int'l Trans. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997). This defense implicates a credibility assessment and raises a material factual issue that cannot be resolved through summary judgment procedure.

Only when the moving party has met its burden of demonstrating the absence of evidence to support the nonmoving party's case does the burden of production shift to the nonmoving party to provide facts that show that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325 (1986). A court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000) (discussing standard for granting judgment as a matter of law under Fed. R. Civ. P. 50, which is the "same" as the standard for granting summary judgment under Rule 56). "[T]he court should give credence to the 'evidence favoring the non-movant as well as that evidence supporting the moving party that is uncontradicted and

unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.* (citations omitted). The Court must consider the entire record, but "disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 2102.

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

If an employer is going to invoke the honest belief defense, it may not avail itself of the summary judgment process that requires that all inferences be made in the non-moving party's favor, unless it is able to demonstrate that the decision was based on particularized facts that would support the absence of a genuine issue of material fact as to its belief.

In this case, the District court granted Spacelabs' Motion for Summary Judgment finding that its inquiry was limited to "whether the employer gave an honest explanation of its behavior" and that the decision-maker provided "unrebutted deposition and affidavit testimony . . . stating why he believed Carrillo to be a more qualified candidate than Tippie, and that his decision was not motivated by an improper purpose", citing *Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000) (District Court Order at p. 15-Appendix B). Even though Tippie demonstrated facts that show that she indeed possessed the skills the decision-maker stated she lacked, the court rejected that evidence finding that there was no showing that the employer knew that she possessed those skills. "Tippie has offered no evidence that would indicate that Turtola knew that she had [been trained as a simultaneous interpreter in Spanish] at the time he made his decision to hire Carrillo." (District Court Order p. 5 n.2-App. B).

However, the decision-maker admitted to not looking at Tippie's background and that he never provided Human Resources the supporting documents that would "*prove* that a consistent and equitable process was employed" as Human Resources had requested in connection with the reorganization process. The Human Resources Representative testified that no one fact-checked the decision-maker, and the decision-maker admitted that had he done what Human Resources asked him to do, he would have discovered Tippie's qualifications because "it might have popped up from the material". These facts show or create a genuine issue of material fact that the decision was not reasonably informed and considered thereby barring an employer from invoking the honest belief rule as a basis for obtaining a summary judgment. The District Court rejected Tippie's attacks on the employer's justifications on the basis of the often-cited holding that the "court should not 'sit as a super-personnel department' by examining the wisdom of an organization's business decisions. *Chapman* at 1030" (District Order p. 14-App. B).

The Eleventh Circuit affirmed the District Court on the grounds that a plaintiff asserting superior qualifications as evidence of pretext will only be successful if the disparities in qualifications are of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question", citing *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004) (App. A at 8-9). The problem with the application of *Cooper* and related cases that apply the honest belief rule is the assumption that the employer's belief was honestly held without the requirement that the employer demonstrate that it made a reasonably informed and considered decision before taking the adverse employment action.

In *Cooper*, the Eleventh Circuit held that "the crucial question here is not whether Cooper fulfilled the requirements,

but whether Howard honestly believed that Cooper did not meet the criteria" and that federal courts do not sit as a super-personnel department that reexamines an entity's business decisions. . . . Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior", citing *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). However in *Elrod*, the employer's belief was supported by an extensive investigation it had conducted prior to terminating the aggrieved employee.

In *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1363 n.3 (11th Cir. 1999), the Eleventh Circuit stated that "an employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct", and in *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002), it held that "we are not interested in whether the conclusion is a correct one, but whether it is an honest one."

The Eleventh Circuit adopted a modified version of the honest belief rule in *Lowe v. Ala. Power Co.*, 244 F.3d 1305 (11th. Cir. 2001). In that case, the Eleventh Circuit rejected a good-faith belief defense that had no legitimate factual basis. In determining when an employer may avail itself of such a defense, the Court, citing *Smith v. Chrysler Corporation*, 155 F.3d 799, 807 (6th Cir. 1998), stated that the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action.

In *Smith*, the Sixth Circuit rejected an "application of the 'honest belief' rule that credits an employer's belief without requiring that it be reasonably based on particularized facts." *Id.* at 806. In *Smith*, the employee argued that Chrysler "stuck its head in the sand" by consciously refusing to make an effort to uncover evidence because it wanted to fire him after it learned he had a disability.

The Court held that when the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process "unworthy of credence," then any reliance placed by the employer in such a process cannot be said to be honestly held. *Id.* at 808. The Sixth Circuit criticized the Seventh Circuit's strict version of the honest belief rule.

The Seventh Circuit takes a strict approach to the application of this rule by crediting the employer's belief without requiring that it be based on particularized facts.

So long as the employer honestly believed in the proffered reason, an employee cannot prove pretext even if the employer's reason in the end is shown to be mistaken, foolish, trivial, or baseless. *Kariotis v. Navistar Int'l Trans. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997). "A reason honestly described but poorly founded is not a pretext as that term is used in the law of discrimination." *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir. 1987). These decisions do not consider the possibility that if the reason is poorly founded, it cannot be honestly held.

The Seventh Circuit in *Flores v. Preferred Technical Group*, 182 F.3d 512 (7th Cir. 1999) rejected the plaintiff's invitation to utilize the Sixth Circuit's approach to the application of the rule. *See also Little v. Illinois Dep't of Revenue*, 369 F.3d 1007 (7th Cir. 2004).

While *Smith* and *Lowe* involved a disability discrimination claim, the Sixth Circuit has utilized that approach in all types of discrimination cases where employers invoke the honest belief rule. *See Balmer v. HCA, Inc.*, 423 F.3d 606, 614 (6th Cir. 2005) (applying *Smith* rule in Title VII retaliation case). The concurring and dissenting opinion in *Chapman*, citing *Smith*, stated that

> 'an employer's strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire' such that 'a multitude of suspicious explanations may itself suggest that the employer's investigatory process was so questionable that any application of the 'honest belief' rule is inappropriate.'

Id. at 1049. It further noted that "while the business judgment rule protects the sincere employer against second-guessing of the reasonableness of its judgments, it does not protect the employer against attacks on its credibility." *Id.* at 1049-51.

In *Laxton v. Gap, Inc.*, 333 F.3d 572 (5th Cir. 2003), the Fifth Circuit rejected the employer's argument that the plaintiff improperly attacked its business judgment. The Court found that Laxton's argument did not impermissibly challenge Gap's business judgment, it permissibly challenged Gap's credibility.

The Tenth Circuit has cited to both the Sixth Circuit *Smith* precedent and the Seventh Circuit *Kariotis* precedent in its decisions without consideration of the tension between these circuits concerning the type of facts, if any, an employer must demonstrate to invoke this defense and the type of facts a plaintiff may cite to show pretext. *See Plotke v. White*, 405 F.3d 1092 (10th Cir. 2005) (citing *Smith*) and *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301 (10th Cir. 1999) (citing *Kariotis*).

The First Circuit followed the *Smith* standard in *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11 (1st Cir. 2002), and the Fourth Circuit, following *Smith* in *Equal Employment Opportunity Commission v. Sears Roebuck and Co.*, 243 F.3d 846 (4th Cir. 2001) rejected the employer's asserted belief about the employability of a candidate because such belief was not substantiated. In *Fischbach v. District of Columbia Dep't of*

Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996), the Court cited the general principle of such rule.

The modified honest belief rule utilized by the Sixth Circuit and in *Lowe* ensures that plaintiffs will have a fair opportunity to show pretext when a decision is based on ignorance. A belief that the person selected was more qualified cannot be "honestly held" when the decision maker did not make a researched decision and was predisposed to selecting the person who was favored. A genuine issue of material fact is thus created as to the credibility of the employer and whether the proffered justification is pretextual.

Thus, certiorari is warranted to resolve a split among the Circuits as to whether an employer must provide evidence that its decision was based on particularized facts in order to invoke the honest belief defense, especially in the summary judgment context.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICABILITY OF SECTION 1981 TO EMPLOYMENT DISCRIMINATION CASES THAT IMPLICATE NATIONAL ORIGIN DISCRIMINATION

Review is also warranted to determine the issue of whether a claim that implicates national origin discrimination also implicates race. The concept of race extends to matters of ancestry which are associated with national origin. *See Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1387 n.7 (10th Cir. 1991).

In this case, the Eleventh Circuit found that Tippie's claim of discrimination was not cognizable under Section 1981 because it construed the decision-maker's statement that Tippie was "not native" as related to national origin, not race.

This Court has interpreted Section 1981 to prohibit discrimination against "identifiable classes of persons who are subjected to intentional discrimination solely because of their *ancestry* or *ethnic* characteristics." *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

The decision-maker's expressed preference for a native person of Argentina implicates Section 1981 because a preference for a native person of a certain country reveals a preference for a person with the ancestral or ethnic characteristics of that region.

The courts have widely assumed that a claim based on national origin cannot be cognizable as a race claim under Section 1981 ignoring the reality that the two claims are not mutually exclusive. Courts have not hesitated to find that discrimination on the basis of alienage is cognizable under Section 1981, *Graham v. Richardson*, 403 U.S. 365, 377 (1971), *Sagana v. Tenorio*, 384 F.3d 731 (9th Cir. 2004) but yet find that Section 1981 does not similarly protect persons whose claims include national origin discrimination. In this case, the discrimination occurred in favor of a foreign individual.

Rather than addressing the direct question of whether a national origin discrimination claim could support a Section 1981 claim, Courts have broadly interpreted race to permit Section 1981 claims by persons of different ethnic groups, which could be construed as "national origin" claims by a more restrictive court thereby not receiving Section 1981 protection. *See Bisciglia v. Kenosha Unified Sch. Dist. No. 1*, 45 F.3d 223, 230 (7th Cir. 1995) (finding that Italians may in fact be an identifiable race protected by § 1981), *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) (section 1981 protection extended to an employee of Puerto Rican descent who alleged national origin discrimination) and *Magana v. Commonwealth of Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997) (Filipino employee entitled to 1981 protection).

To ensure uniformity in the Circuit Courts' interpretation of "race" so that all appropriate claims receive Section 1981 protection, this Court should grant review on this issue.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 27, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-14384
Non-Argument Calendar

D. C. Docket No. 04-60456-CV-WPD

STEPHANIE TIPPIE,

Plaintiff-Appellant,

versus

SPACELABS MEDICAL, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 27, 2006)

Before BLACK, HULL and MARCUS, Circuit Judges.

PER CURIAM:

Stephanie Tippie appeals the district court's order granting summary judgment in favor of her former employer,

Appendix A

Spacelabs Medical, Inc. (Spacelabs), as to her complaint alleging national origin and gender discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, *et seq.*, and the Florida Civil Rights Act (FCRA), § 760.10, Fla. Stat., and race discrimination in violation of 42 U.S.C. § 1981. Tippie asserts the district court erred in granting summary judgment because she presented both direct and circumstantial evidence to show Spacelabs discriminated against her when it failed to retain her in the newly created "Product Line Manager" or "Senior Product Management" positions after the company underwent a reduction-in-force. Tippie also contends the district court erred in dismissing her § 1981 race discrimination claim. We affirm the district court.

I. DISCUSSION

A. *Standard of Review*

We review "a grant of summary judgment *de novo*, using the same legal standard as the district court." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1184 (11th Cir. 1997). Summary judgment is proper if the pleadings, depositions, and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986) (quoting Fed. R. Civ. P. 56(c)). The evidence, and all inferences drawn from the facts, must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). "A mere scintilla of evidence in support of the nonmoving party will not suffice to overcome a motion for summary judgment." *Young v. City of Palm Bay*, 358 F.3d 859, 860 (11th Cir. 2004).

Appendix A

B. *Title VI and FCRA*[1]

Title VII states, in relevant part, that it is "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a). A plaintiff may prove a claim of discrimination through (1) direct evidence, (2) circumstantial evidence, or (3) statistical proof. *See Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

1. *Product Line Manager position*

Tippie asserts she presented both direct and circumstantial evidence of discrimination based on Spacelabs' failure to hire her into the Product Line Manager position.

a. Direct evidence

Tippie contends she presented direct evidence that Spacelabs intentionally discriminated against her on the basis of her national origin, namely when Jukka Turtola, the decision-maker in this case, used the phrase "not native" in an e-mail in which he compared the qualifications of Tippie and Facundo Carrillo, the individual ultimately selected for

1. A claim under the FCRA is analyzed under the same standards as a Title VII claim. *See Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998).

the Product Line Manager position. In the e-mail, Turtola listed "[n]ative in Spanish language" as an important requirement for the position, and then noted Carrillo was "native in Spanish" whereas Tippie "speaks some basic Spanish but is not native."

"Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact in issue without inference or presumption. Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [a protected characteristic] constitute direct evidence of discrimination." *Bass v. Board of County Comm'rs, Orange County, Florida*, 256 F.3d 1095, 1105 (11th Cir. 2001) (quotations, alterations, and citations omitted).

We conclude Tippie did not present direct evidence of discrimination. Taken in context, Turtola's use of the phrase "not native" was a manner of describing Tippie's Spanish language abilities, not her national origin. In any event, because this comment does not "prove the existence of a fact in issue without inference or presumption," it is not direct evidence of discrimination. *See Bass*, 256 F.3d at 1105; *cf. Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999) (finding direct evidence of intentional racial discrimination where employer admitted that it had made job assignments based on race). Because Turtola's comment is not a blatant remark "whose intent could be nothing other than to discriminate," the district court did not err in finding Tippie failed to present direct evidence of discrimination. *See Bass*, 256 F.3d at 1105.

Appendix A

b. Circumstantial evidence

We use the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973), and *Texas Dep't of Cmty. Afairs v. Burdine*, 101 S. Ct. 1089 (1981), in order to evaluate claims based on circumstantial evidence of discrimination. *See Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) *(en banc)*. Under this approach, if a plaintiff can establish *a prima facie* case of discrimination, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. *McDonnell Douglas*, 93 S. Ct. at 1824. If the employer meets this burden, then the burden shifts back to the plaintiff and merges with the ultimate burden of persuasion, which "remains at all times with the plaintiff," and the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 101 S. Ct. at 1093. A plaintiff can meet this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 1095.

> A plaintiff in a job-reduction case establishes *a prima facie* case by showing:
>
> (1) that he was in a protected group and was adversely affected by an employment decision;
> (2) that he was qualified to assume another position at the time of discharge or demotion; and
> (3) evidence by which a factfinder might

reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

Barnes v. Southwest Forest Indus., Inc., 814 F.2d 607, 609 (11th Cir. 1987). In *Jameson v. Arrow Co.*, an age discrimination case, we noted we generally have "eschewed an overly strict formulation of the elements of *a prima facie* case," and concluded "where a job for which the plaintiff is qualified, and for which the plaintiff applies, is available at the time of termination, and the employer offers the job to an individual outside the protected . . . group, an inference of intentional discrimination is permissible." 75 F.3d 1528, 1531-32 (11th Cir. 1996); *see also Burdine*, 101 S. Ct. at 1094 (noting the plaintiff's burden of establishing a *prima facie* case "is not onerous").

We conclude Tippie met her burden of demonstrating *a prima facie* case of discrimination based on either her national origin or her gender, and the district court erred in finding otherwise. Following the reduction-in-force, Tippie was qualified for and considered for an available position within the company, but Spacelabs offered the job to Carrillo, who was not American or female. Although this is not strong evidence, it is sufficient to raise an inference of intentional discrimination based on either national origin or gender. *See Jameson*, 75 F.3d at 1531-32.

Because Tippie has established *a prima facie* case of discrimination, Spacelabs has the burden of producing a legitimate, non-discriminatory reason for the adverse employment action. *McDonnell Douglas*, 93 S. Ct. at 1824.

In this case, Spacelabs asserted it chose to hire Carrillo instead of Tippie because he was better qualified for the position based on (1) his experience working for and running a distributor in Latin America; (2) his greater technical and clinical training and experience; and (3) his superior language abilities. We conclude this was a legitimate reason for choosing to hire Carrillo, and therefore, the burden shifts back to Tippie to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 101 S. Ct. at 1093.

Tippie attempts to show pretext in a number of ways, including (1) directly, by alleging that she was more qualified for the position; (2) indirectly, by showing that the decision-making process was unworthy of credence; and (3) indirectly, by showing shifting justifications for the adverse employment action. Tippie failed to raise a genuine issue of material fact regarding whether Spacelabs' reasons were pretext, and she failed to produce sufficient evidence to meet her ultimate burden of proving by a preponderance of the evidence the adverse employment action was based on discriminatory animus. Tippie cannot show Spacelabs' reasons were pretext by arguing she was more qualified for the position. Although it is possible to show pretext by asserting superior qualifications, a plaintiff will only be successful if the "disparities in qualifications [are] of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004) (quotations and

citation omitted), *cert. denied*, 126 S. Ct. 478 (2005).[2] In this case, Tippie was unable to show her qualifications were so much better than Carrillo's that no reasonable person could have chosen Carrillo for the position. Tippie's other attempts at showing pretext also fail, as our independent review of the record shows Spacelabs' reasons for selecting Carrillo would motivate a reasonable employer and were consistent throughout the entire process. Accordingly, we affirm the district court's grant of summary judgment to Spacelabs as to this issue.

2. *Senior Product Management position*

Tippie asserts she also presented both direct and circumstantial evidence of discrimination with respect to Spacelabs failure to hire her into the Senior Product Management position. As discussed above, Tippie failed to present any direct evidence of discrimination, and thus, must proceed under the *McDonnell Douglas* burden-shifting framework used to evaluate circumstantial evidence.

The district court did not err in concluding Tippie failed to establish *a prima facie* case of discrimination with respect to the Senior Product Management position. Tippie did not demonstrate, under the second prong of the *prima facie* analysis, that she was qualified to assume the position

2. In *Ash v. Tyson Foods, Inc.*, the Supreme Court held this Court's precedent requiring the disparity in qualifications be "so apparent as virtually to jump off the page and slap you in the face," to be unhelpful and imprecise. 126 S. Ct. 1195 (2006). In *Ash*, the Supreme Court cited, without articulating an exact standard, the standard quoted above. *Id.*

because she did not have an engineering degree or sufficient technical knowledge of the products.

B. *Dismissal of race discrimination claim under 42 U.S.C. § 1981*

Tippie asserts the district court erred in dismissing her claim of race discrimination under 42 U.S.C. § 1981 after finding the claim was premised entirely on discrimination based on her national origin, not her race. "Section 1981 prohibits intentional race discrimination in the making and enforcement of public and private contracts, including employment contracts." *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999); *see also Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2026 (1987) (noting § 1981 has been construed to forbid all "racial" discrimination in the making of contracts). "All persons . . . shall have the right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981(a). By its very terms, § 1981 applies to claims of discrimination based on race, not national origin. *See id.*

The district court did not err in dismissing Tippie's § 1981 race discrimination claim because her only alleged evidence of discrimination was based on the fact that she is not a native of Latin America. This is a claim based on her national origin, not her race. Accordingly, the district court did not err in dismissing this claim as not cognizable under 42 U.S.C. § 1981.

Appendix A

II. CONCLUSION

Tippie failed to raise a genuine issue of material fact on her claims of discrimination. The district court did not err in granting Spacelabs' motion for summary judgment.

AFFIRMED.

APPENDIX B — FINAL ORDER OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA GRANTING MOTION FOR SUMMARY JUDGMENT AND CLOSING CASE DATED AND FILED JULY 20, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60456-CIV-DIMITROULEAS

Magistrate Judge Torres

STEPHANIE TIPPIE,

Plaintiff,

vs.

SPACELABS MEDICAL, INC.,

Defendant.

FINAL ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND CLOSING CASE

THIS CAUSE is before the Court upon Defendant Spacelabs Medical, Inc.'s Motion for Summary Judgment [DE 26]. The Court has carefully considered this motion, Defendant's Memorandum in Support of its Motion for Summary Judgment [DE 27], Plaintiff Stephanie Tippie's Response [DE 38-2], Defendant's Reply [DE 40], Defendant's Statement of Undisputed Material Facts [DE 28], Plaintiff's Statement of Disputed Material Facts [DE 38-1], the Appendix to Motion for Summary Judgment [DE 29],

Appendix B

Plaintiff's Notice of Filing Declaration and Depositions [DE 38], and being otherwise fully advised in the premises, finds as follows:

I. BACKGROUND

Stephine Tippie ("Tippie") brings this action alleging that Defendant Spacelabs Medical, Inc. ("Spacelabs") intentionally discriminated against her on the basis of her national origin, race, and sex in violation of Title VII, the Florida Civil Rights Act, and 42 U.S.C. § 1981.[1] Defendant Spacelabs Medical, Inc. ("Spacelabs") was a company in the medical equipment business that sold its products to hospitals and physicians around the world including in Southern Florida. Tippie is a Jewish, American, Caucasian, woman that worked for Spacelabs as a Key Account Manager in its Latin American Sales Division since August 1995. In that

1. Tippie's claim of race discrimination under 42 U.S.C. § 1981 is insufficient as a matter of law, because it is actually based upon national origin discrimination. Section 1981 bars claims based on race, ethnicity or lack of citizenship, but it does not provide protection for individuals discriminated against on the basis of national origin. *See Saad v. Baltimore Life Ins.* Co., 47 Fed. Appx. 228, 232 (4th Cir. 2002). While Tippie's Amended Complaint identifies her race as "white and Jewish and American," Tippie has failed to provide any evidence that could be construed as discrimination on the basis of being white or Jewish. Rather, Tippie presents evidence alleging discrimination on the basis that she is "not native"-i.e., an American who was discriminated against in favor of two Argentinean men. Accordingly, Tippie's claim for violations of 42 U.S.C. § 1981 must fail because the only purported evidence is of national origin discrimination, not race discrimination.

position Tippie was primarily responsible for sales of medical equipment within Central America and the Caribbean.

In July 2002, Instrumentarium Corporation acquired Spacelabs. Datex-Ohmeda, a subsidiary of Instrumentarium, was a direct competitor with Spacelabs. Therefore, after the acquisition, Instrumentarium was left with a redundancy in its sales territories in Latin America. Datex-Ohmeda's Regional Director for Latin America, Jukka Turtola ("Turtola"), was given the responsibility of reorganizing and eliminating such redundancies after the acquisition. Turtola concluded that the sales territories of Datex-Ohmeda had more developed distributor networks with greater market share than the sales territories of Spacelabs; and thus decided to eliminate the Spacelabs Key Account Manager positions.

At the time of the acquisition there were four people employed as Key Account Managers by Spacelabs: Augusto DeMelo ("DeMelo"), who was based in Brazil; Sylvia Hierro-Molino ("Hierro-Molino"), who was based in Mexico; Facundo Carrillo ("Carrillo"), who was based in Argentina; and Tippie, who was based in Fort Lauderdale, Florida. After making the decision to eliminate the Key Account Managers, Turtola considered these four employees for positions in the new organization in Latin America. Turtola had two meetings with the Key Account Managers prior to deciding which employees would be offered new positions. The first meeting was an introductory meeting at Datex-Ohmeda's Miami office where all of Spacelab's Key Account Managers attended. At that meeting, Turtola instructed the Key Account Managers to prepare distributor evaluations to assist him in evaluating

Spacelabs' business. During the second meeting, the Key Account Managers gave presentations regarding the distribution networks they used to sell Spacelabs' products, and Turtola met individually with each of the Key Account Managers. During these meetings Turtola overheard Tippie speaking Spanish, and concluded that she only had a basic ability to speak Spanish.

Turtola made the decision to offer each of the Key Account Managers a new position, with the exception of Tippie. DeMelo was offered the newly created position of Datex-Ohmeda Area Manager for Brazil, since he was located in Brazil and already managed sales in that area. Hierro-Molino was hired as an independent distributor in Mexico City, where she was located. Turtola considered both Tippie and Carrillo for the newly created position of Spacelabs' Burdick Product Line Manager ("Burdick position"), but ultimately elected to offer the position to Carrillo. Tippie contends that the selection of Carrillo over her for the Burdick position was the result of intentional discrimination by Turtola.

In an August 20, 2002 email from Denisse Garcia, an assistant to Turtola, to Holly Borden, Spacelabs' vice-president in charge of human resources, a general description of the selection criteria for the Burdick position was offered. In that email it was suggested that the following criteria would be important for selecting the candidate to fill that position: "work history, Sales/Technical Knowledge, Work Ethics, Divisions Needs and Future Requirements, Education, Knowledge of the Area they serviced (Latin America), Knowledge in the business areas required for the future division." (See Depo. Holly Borden, Exhibit 4.)

Appendix B

In a subsequent August 27, 2002 email from Turtola to Borden, Turtola offered a more detailed profile of the requirements needed for the Burdick position. According to the August 27, 2002 email the person selected for the Burdick position must have the following,

> . . . solid and proven management skills to be able [to] manage a large number of independent distributor companies in the entire Latin America market. The person needs to be able to further develop and build the distribution channel into an independent direction (on non-exclusive basis) and make the product line grow. The person needs to have a solid understanding of the medical equipment markets overall in Latin America. The person should have a strong knowledge in cardiology and preferably technical background. As the channel management of the product line will differ substantially from the patient monitoring and anaesthesia machine channel to market management, it is extremely important the individual can work relatively independently towards the given goals. Excellent communication skills with the distributors' sales management and sales force are of vital importance to be successful in the job. Native in Spanish language it is an important asset[] in being able to communicate with the field sales force. Ability to communicate in Portuguese is an extra plus and obviously facilitates distributor management in the Brazilian territory.

(Appendix to Defendant's Motion for Summary Judgment [DE 29] August 27, 2002 email, Exhibit A.)

Appendix B

The August 27, 2002 email from Turtola also offered a comparison of Carrillo and Tippie against the above-stated requirements for the Burdick position. Turtola's description of Carrillo was as follows,

> He has wide knowledge of the Latin American medical equipment market. He has previously run a distributor organization in Argentina and knows what a distributor needs from the principal. He has an excellent combination of technical and clinical knowhow. He has proved to be able to work extremely well independently. His qualifications as a business manager are highly appreciated in the existing distribution channel. He is a native in Spanish and fluent in Portuguese.

(*Id.*)

Turtola also offered a description of Tippie that stated,

> She is very experienced and high-caliber field sales person for medical equipment. She has clinical background which is an important asset[] in communicating with the end-customers, clinicians and nursing staff. Her strengths are in the area of field sales rather than distributor management and pro-active channel-to-market development. She doesn't have the technical/ engineering perspective and understanding of the medical equipment which is elementary. She speaks some basic Spanish but is not native. She

> does not have any command of Portuguese language.

(*Id.*)

Based upon the above comparison, Turtola decided that Carrillo was best qualified for the Burdick position. In particular, Turtola believed that Carrillo was a better candidate because he possessed firsthand knowledge of running a distributorship in Latin America, since he previously worked for a distributor of cardiology equipment for twenty years — fourteen of which he served as general manager — in Latin America. Turtola believed that Tippie's strength was in sales rather than managing a distributorship. Moreover, Turtola believed that Carrillo had superior technical and clinical experience that would be relevant to the position, because Carrillo's prior position provided him with experience being responsible for technical product service and development, as well as managing product sales. Carrillo also had an education and training in engineering, while Tippie's education was in respiratory therapy, which is more clinical in nature. Lastly, Turtola believed that Carrillo possessed better language abilities. After hearing both candidates speak Spanish, Turtola concluded that Tippie's Spanish was basic, while Carrillo, as a native Spanish speaker, possessed a superior ability to communicate.[2] Furthermore, Turtola knew that Carrillo

2. The Court notes that Tippie has provided deposition testimony that she had training as a simultaneous interpreter in Spanish. However, Tippie has offered no evidence that would indicate that Turtola knew that she had this ability at the time he made his decision to hire Carrillo.

was able to speak Portuguese, and that Tippie could not.[3]

Tippie was notified of her termination on August 30, 2002, but the effective date of her termination was actually September 27, 2002. On or about September 15, 2002, Turtola interviewed Jorge Szmulewicz ("Szmulewicz"), and during that interview Szmulewicz indicated that he was planning a move to the United States and was interested in working for Datex-Ohmeda. Szmulewicz, who has an electrical engineering degree and technical expertise working with ventilation and anesthesia devices, was the part owner of an independent distributorship that had worked with Datex-Ohmeda previously. Based upon this experience Turtola believed that Szmulewicz would be a good fit as the Senior Product Manager for Latin America. All the other employees in a product management role were engineers, including the supervisor of the Senior Product Manager position. Moreover, while in the position of Product Manager, Szmulewicz has been called upon to give presentations about how the company's products relate to technical concepts such as Entropy, an engineering concept with applications related to measuring patient response to anesthesia delivery. Tippie does not allege to be an engineer, and conceded during her deposition that she did not know about the concept of Entropy. Nevertheless, Tippie maintains that the Products Manager position was actually a sales position, even though

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3. The Court notes that Tippie has provided deposition testimony that she can speak Portunol-a hybrid of Spanish and Portuguese. Tippie maintains that she has given presentations within Brazil using Portunol. However, Tippie does not suggest that she is able to speak Portuguese.

the company has provided evidence that sales in the area were handled by those holding a different position, Area Sales Managers. Tippie also argues that the selection of Szmulewicz for the Senior Product Manager position was the result of intentional discrimination.

II. DISCUSSION

A. Summary Judgment Standard

Courts may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party faces the stringent burden of establishing the absence of a genuine issue of material fact before summary judgment may be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When deciding such a motion a court will not grant summary judgment unless it is clear that a trial is unnecessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If uncertainty exists in regards to the necessity of a trial the court will resolve any doubts against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

The burden of production for a summary judgment motion resets first with the movant. It is the movant that "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at

323. To satisfy this burden the movant must demonstrate that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325. Only after the movant has discharged its burden does the burden of production shift to the nonmoving party. If the burden does shift, then the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To meet their burden the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 587.

Essentially, so long as the nonmoving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson*, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). Consideration of a motion for summary judgment does not lessen the burdens on the non-moving party; the non-moving party still bears the burden of coming forward with sufficient evidence on each element that must be proven. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). Granting summary judgment in favor of defendants is not rare in employment discrimination cases. *Id.* at 1081.

Appendix B

B. Employment Discrimination Standards

In employment discrimination case, the plaintiff bears the burden of producing "sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion." *Alphin v. Sears, Roebuck & Co.*, 940 F.2d 1497, 1500 (11th Cir. 1991) (citations omitted). A court's inquiry at the summary judgment stage is whether an ordinary person could reasonably infer discrimination if the facts present remain unrebutted. *Williams v. Vitro Serv. Corp.*, 144 F.3d 1438, 1441 (11th Cir. 1998) (citations omitted). The plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. *Earley*, 907 F.2d at 1081. If plaintiff satisfies this initial burden, then the burden shifts to the defendant to produce legitimate, nondiscriminatory reasons for the adverse employment action. *Id.* If the defendant can meet this burden, then the burden shifts back to the plaintiff to establish that those reasons are pretextual. *Id.* In order to survive summary judgment the plaintiff must demonstrate specific facts that show that each of the defendant's proffered reasons are mere pretext, that the reasons offered for the employment action had no basis in fact, or that the reasons given were insufficient to motivate the decision. *Dalmau v. VAEIG*, 337 F. Supp. 2d 1299, 1307-08 (S.D. Fla. 2004).

A plaintiff can establish a *prima facie* case of discrimination in one of three ways: (1) through direct evidence of discrimination; (2) through circumstantial evidence of discrimination by meeting a modified *McDonnell Douglas* test; or (3) through proof of a statistical pattern of discrimination. *See Earley*, 907 F.2d at 1081.[4] Here, it appears that Tippie

4. Although Tippie states claims under Title VII, the Florida Civil Rights Act, and 42 U.S.C. § 1981, the claims under each must be (Cont'd)

concedes that she is unable to demonstrate a statistical pattern of discrimination, but claims that there is sufficient direct and circumstantial evidence to establish a *prima facie* claim.

1. Direct Evidence of Discrimination

Direct evidence of discrimination is "evidence which reflects 'a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee'." *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999) (quoting *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641 (11th Cir. 1998)). Such evidence, "if believed, would prove the existence of a fact without inference or presumption." *Earley*, 907 F.2d at 1081. "'[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of' some impermissible factor [such as race, national origin or sex] constitutes direct evidence of discrimination." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004) (quoting *Rojas v. Florida*, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002)). If a "statement suggests, but does not prove a discriminatory motive, then it is circumstantial." *Id.*

In support of her claims of national origin discrimination,[5] Tippie points to one incident that she argues amounts to direct

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analyzed using the same legal framework. *See Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Lee v. Russell County Bd., of Educ.*, 684 F.2d 769, 773 (11th Cir. 1982).

5. Tippie does not offer any direct evidence to support her claims for race or gender discrimination.

evidence. According to Tippie, Turtola's use of the term "not native" in his description of her should be considered direct evidence of discrimination.[6] The Court disagrees. Turtola's "not native" statement was made in an August 27, 2002 email that describes the requirements for the Burdick Product Line Manager position and offers a comparison of the qualifications that Carrillo and Tippie have that relate to that position. In the August 27, 2002 email Turtola describes Carrillo's language ability as ". . . native in Spanish and fluent in Portuguese." In the same email Turtola describes Tippie's language skills by stating, "[s]he speaks some basic Spanish but is not native. She does not have any command of Portuguese language." Tippie argues that Turtola's use of "not native" in this context amounts to direct evidence of national origin discrimination. At most, Turtola's use of the phrase "not native" suggests discrimination, but requires a further inference or presumption in order to find evidence of a discriminatory motive. Consequently, Tippie has not produced direct evidence of discrimination based on national origin.

2. Circumstantial Evidence of Discrimination

When there is no direct evidence of discrimination a plaintiff can prove its *prima facie* case of discrimination by presenting circumstantial evidence using the burden shifting procedure created in *McDonnell Douglas Corp. v. Green*,

6. The Court notes that far more blatant and offensive remarks than "not native" have been found not to be direct evidence of discrimination. *See e.g.*, *Wavde v. Digital Equip. Corp.*, 994 F. Supp. 1433, 1439 (S.D. Fla. 1997) (holding that statements such as "Why don't you understand? Is it because of your background, or is it because of your ethnic background or where you have come from?" did not constitute direct evidence of discrimination).

411 U.S. 792 (1973). In a reduction in force case, the Eleventh Circuit has adopted a variant of the *McDonnell Douglas* test that requires a plaintiff using circumstantial evidence establish her *prima facie* case by demonstrating (1) that she was in a protected group and was adversely affected by an employment decision; (2) that she was qualified for her current position or to assume another position at the time of discharge; and (3) evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of an illegal criterion in reaching the decision at issue. *Earley*, 907 F.2d at 1082. "Where a particular job position is entirely eliminated for nondiscriminatory reasons, for plaintiff to prevail against [her] employer [she] must show that [she] was qualified for another available job with that employer. . . ." *Barnes v. Sw. Forest Industr., Inc.*, 814 F.2d 607, 609 (11th Cir. 1987).

That Tippie was in a protected group — i.e., a Jewish, American female — and was adversely affected by an employment decision — i.e., terminated — is uncontested. However, Spacelabs contends that there is insufficient circumstantial evidence to meet the last two elements necessary for demonstrating a *prima facie* case in a reduction in force context. Additionally, Spacelabs contends that there were legitimate, nondiscriminatory reasons for Tippie's termination, which would shift the burden back on Tippie to demonstrate that the proffered reasons were pretextual. Moreover, Spacelabs argues that Tippie is unable to provide sufficient disputed facts that could show that these reasons are merely pretextual, that the reasons offered had no basis in fact, or that the reasons given were insufficient to motivate the decision. *Dalmau*, 337 F. Supp. 2d at 1307-08.

Appendix B

C. Tippie's Discrimination Claims Relating to Burdick Position

Utilizing the above standards the Court must now turn to the question of whether there is a genuine issue of material fact regarding Tippie's ability to present a *prima facie* case for discrimination relating to the selection of Carrillo instead of her for the Burdick Product Line Manager Position ("Burdick position"). *See Earley*, 907 F.2d at 1082. As mentioned above, there is no question that Tippie was in a protected group and that she suffered an adverse employment action as a result of the reduction in force. However, to successfully demonstrate a *prima facie* case in this context Tippie must also provide evidence that she was qualified to assume the Burdick position at the time of her dismissal. At the very least, Tippie fails to meet the job requirements for the position because she cannot speak Portuguese, and is unable to rebut the evidence that she did not possess the technical background sought for the position.[7] Moreover,

7. Tippie argues that the that original selection criteria did not include a language requirement and that she possessed the requisite technical knowledge to qualify her to assume the Burdick position. According to Tippie, the original selection criteria for the Burdick position included, "Work History, Sales/Technical Knowledge, Work Ethics, Division Needs and Future Requirements, Education, Knowledge of the Area they serviced (Latin America), [and] Knowledge in the business areas required for the future division." Tippie alleges that the subsequent addition of a language requirement and Turtola's decision that she did not have the necessary experience are nothing more than part of a results-oriented comparison designed by Turtola to justify his decision to hire Carrillo. The Court notes that these arguments do not demonstrate that Tippie was qualified for the Burdick position, but rather are attempts to discredit the purported qualifications for that position. As such, the Court will address these arguments later in its analysis, because such arguments are more properly entertained in the Court's analysis of pretext.

when Turtola's "not native" statement is placed in context it becomes evident that Turtola was referring to language skills rather than national origin, which leaves Tippie with insufficient circumstantial evidence upon which a reasonable person could conclude that Turtola intended to discriminate against her based upon illegal criteria.

The Court will nevertheless assume *arguendo* that there is sufficient evidence to establish a *prima facie* case for discrimination relating to the Burdick position in order to shift the burden to Spacelabs to produce a legitimate, nondiscriminatory justification for its action. Moreover, the Court finds that Spacelabs has produced legitimate, nondiscriminatory reasons for its termination of Tippie: that a reduction in force eliminated Tippie's position and that Carrillo was the better candidate for the Burdick position.[8]

8. There is no evidence to suggest that the elimination of Spacelabs' Key Account Manager positions, the position held by Tippie, in the Latin American division was the result of discrimination. According to Spacelabs, the decision to eliminate those positions was the result of acquisition of Spacelabs by Instrumentarium Corporation in July 2002. Datex-Ohmeda, a subsidiary of Instrumentarium, was a direct competitor with Spacelabs in Latin America, which meant that the acquisition of Spacelabs created redundancy in Instrumentarium's sales territories in Latin America. Turtola was given the responsibility of reorganizing and eliminating redundancies after the acquisition. Turtola concluded that the sales territories of Datex-Ohmeda had more developed distributor networks with greater market share than the sales territories of Spacelabs; and thus decided to eliminate the Spacelabs Key Account Manager positions. Tippie does not offer, and the Court does not find, evidence that Turtola's decision was the result of discrimination. Rather, Tippie alleges that Spacelabs discriminated against her when the company did not offer her another position, even though she was qualified for that position.

Appendix B

According to Spacelabs, Carrillo was considered the better candidate for the Burdick position because (1) he had previously worked as a general manager of a distributor of cardiology equipment in Latin America where he was responsible for technical product service and development, (2) he was educated and trained in engineering, while Tippie's education came from a clinical background in respiratory therapy, (3) and he had superior language skills because he was a native Spanish speaker and spoke Portuguese. Thus, the burden shifts back to Tippie to demonstrate that there is a genuine factual question of pretext regarding Spacelabs' proffered reasons. *See Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 601 (11th Cir. 1994).

In order to avoid summary judgment, a plaintiff bears the burden of presenting significant evidence that demonstrates an existence of a genuine issue of material fact as to the truth of each of the reasons proffered by the employer for its challenged action. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997). Here, Tippie argues that Spacelabs' proffered reasons for Carrillo being a better candidate for the position are rife with "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" that would cause a reasonable fact finder to conclude that the proffered reasons are unworthy of credence. *Id.* at 1538. Specifically, Tippie maintains that the selection criteria was results-orientated, i.e., created to ensure the selection of Carrillo, and that her language skills and experience managing distributors were de-emphasized by Turtola. However, Tippie "confuses *disagreement* about the wisdom of an employer's reasons with *disbelief* about the existence of that reason and its application in the circumstances." *Id.* at 1543.

Appendix B

As many other courts have held, this Court should not "sit as a super-personal department" by examining the wisdom of an organization's business decisions. *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000). If the reasons proffered by the defendant "might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it. Quarreling with that reason is not sufficient." *Wilson*, 376 F.3d at 1090. Accordingly, the Court's "inquiry is limited to whether the employer gave an honest explanation of its behavior." *Chapman*, 229 F.3d at 1030. The question for this Court is not whether Carrillo was more qualified than Tippie for the Burdick position, but rather whether Spacelabs' stated reasons for choosing Carrillo are honest explanations of its decision. *See Wavde*, 994 F. Supp. at 1438 n.5.

Spacelabs has submitted unrebutted deposition and affidavit testimony from Turtola stating why he believed Carrillo to be a more qualified candidate than Tippie, and that his decision was not motivated by an improper purpose. First, Carrillo was thought to have superior experience managing a distributor in Latin America, given that he worked for twenty years — fourteen of those years as the general manager — for a distributor of cardiology equipment in Latin America. Turtola believed Tippie's distributor management experience was not comparable to Carrillo's experience, and that her true strength was in field sales rather than management. The Court finds no material evidence to suggest that Turtola did not honestly believe Carrillo's experience managing distributors in Latin America was superior to Tippie's experience. Moreover, the Court finds that requiring experience managing distributors of cardiology equipment

in Latin America to be a reasonable motivation in filling the Burdick position, since the position was created, in part, to develop distribution channels for cardiology equipment in Latin America.

Second, Carrillo was thought to have greater technical and clinical experience as a result of his previous experience as general manager, which included being responsible for technical product service and development, as well as managing product sales. There is no evidence that Tippie had comparable technical experience. Additionally, Turtola believed that Carrillo's education and training in engineering made him better suited to perform the technical aspects of the Burdick position, since Tippie's education in respiratory therapy was clinical rather than technical in nature. The Court finds no material evidence to suggest that Turtola did not honestly believe that Carrillo's technical experience and education in engineering would make him a better candidate than Tippie. Moreover, the Court finds requiring technical experience and an education in engineering to be reasonable motivations for filling the Burdick position, because of the esoteric nature of the cardiology business.

Lastly, Turtola believed that Carrillo's ability to speak both Spanish and Portuguese made him a better candidate, since it would allow him to communicate in the official languages of all Latin American countries. While Tippie and Carrillo both were able to communicate in Spanish,[9] Tippie lacked the ability

9. Tippie contends that Turtola wrongly classified her Spanish abilities as basic, because she is actually fluent in Spanish. Even assuming that Tippie and Carrillo, a native Spanish speaker, possess identical Spanish proficiency, it is not the Court's role to second-guess an employer's decision as to which candidate maintains greater abilities. *Chapman*, 229 F.3d at 1030.

to speak Portuguese.[10] The Court finds no material evidence to suggest that after Turtola heard both Carrillo and Tippie speak in Spanish, he believed that Carrillo spoke better Spanish than Tippie. Also, the Court finds no evidence that Tippie can speak Portuguese, while it is uncontested that Carrillo can in fact speak Portuguese. Moreover, the Court finds that requiring the ability to speak Spanish and Portuguese are reasonable motivations for filling the Burdick position, since these languages are the official languages of the countries over which the Burdick Manager would supervise.

In contrast, Tippie has not provided statements from any of the decision-makers from Spacelabs that would support that the reasons proffered for Carrillo being the better qualified candidate were created pretextually to allow the company to hire Carrillo based on improper purposes. Moreover, Tippie has failed to provided any other evidence of discriminatory intent in creating the requirements that the individual selected for the Burdick position should have experience managing distributors in Latin America, possess a technical background, and be able to speak both Spanish and Portuguese. The only purported evidence of discrimination offered by Tippie is that Turtola once used the phrase "not native" in an email. However, when Turtola's

10. Tippie maintains that her inability to speak Portugese should not disqualify her from the Burdick position because she has in the past taught seminars in Brazil using Portunol — a hybrid of Spanish and Portuguese. However, this argument amounts to quarreling with the proffered reasons of Spacelabs, instead of meeting this reason head on and rebutting it. As stated above, such attempts to recast a position's qualifications are insufficient, and will not be entertained by the Court. *See Wilson*, 376 F.3d at 1090.

use of "not native" is given its proper context, it becomes clear that this statement was used to describe the ability of the two candidates to speak Spanish. The Court finds that no reasonable person could conclude on that Turtola's use of "not native" constitutes evidence of an intent to discriminate.

Tippie further claims that the Spacelabs has offered multiple justifications over time for its decisions not to hire Tippie for the Burdick position, and that this change in justifications is probative of pretext. When an employer offers different and arguably inconsistent explanations, at different times, for its employment decision, a jury may infer that the articulated reasons are pretextual. *Dominguez-Cruz v. Suttle Carbie, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000). However, there is no evidence that demonstrates that Spacelabs has offered different justifications at different times for Carrillo being considered the better candidate for the Burdick position. At all times Turtola has maintained that Carrillo was better qualified for the Burdick position, because (1) he had previously worked as a general manager of a distributor of cardiology equipment in Latin America where he was responsible for technical product service and development, (2) he was educated and trained in engineering, while Tippie's education came from a clinical background in respiratory therapy, (3) and he had superior language skills because he was a native Spanish speaker and spoke Portuguese.[11]

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11. Tippie contends that the different selection criteria listed in the August 20 and August 27 emails establishes that Spacelabs offered different justifications for the selection of Carrillo. The Court does not agree. The justifications offered by Spacelabs for selecting Carrillo are discussed above, and there is no evidence that these

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In sum, Tippie's evidence is insufficient to create a plausible inference of discrimination in light of the evidence that Spacelabs had multiple, legitimate, nondiscriminatory reasons to not offer Tippie the Burdick position. Without providing evidence sufficient to produce a material factual dispute as to whether Spacelabs' proffered reasons were pretextual, Tippie is unable to create a jury question. See *Wilson*, 376 F.3d at 1090. Accordingly, Spacelabs Motion for Summary Judgment should be granted as it relates to the Burdick position.

D. Tippie's Discrimination Claims Relating to the Senior Product Manager Position

Tippie's claims of discrimination in the selection of Szmulewicz for the position of Senior Product Manager ("Product Manager") fail for many of the same reasons her

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have ever changed. However, even assuming *arguendo* that the selection criteria proposed in the August 20 and August 27 emails constitutes different justifications at different times, the Court nevertheless does not find these justifications to be inconsistent. The selection criteria in the August 27 email are merely more specific explanations of the selection criteria found in the August 20 email. For example, the language requirement found in the August 27 email is a more specific explanation of what the Spacelabs intended by listing education and knowledge of Latin America as requirements in the August 20 email. Moreover, the selection criteria from both emails are consistent in requiring relevant work history, technical knowledge, education, and knowledge of Latin America. Accordingly, assuming the emails constitute different justifications, the Court does not find that under these circumstances Tippie could receive the inference of pretext that she seeks.

claim for discrimination failed in relation to the seletion of Carrillo for the Burdick position. First, there exists insufficient evidence to establish a *prima facie* case for discrimination relating to the Product Manager position. While Tippie meets the first element of establishing a *prima facie*, she fails to demonstrate that she was qualified to assume the Product Manager position at the time of her dismissal.[12] At the very least, Tippie fails to meet the job requirements for the position because she is not an engineer.[13] Moreover, no evidence exists upon which a reasonable person

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12. Spacelabs argues that the Product Manager position was not in existence at the time of Tippie's dismissal, and therefore they were not obligated to consider her for that position. In support of this contention, Spacelabs points to the fact that Szmulewicz was not hired until approximately five months after Tippie's termination. Tippie counters, however, that the Turtola was considering Szmulewicz for Product Manager at substantially the same time that Tippie was terminated. In support of this argument, Tippie provides evidence that Turtola interviewed Szmulewicz in Miami during September 2002. Accordingly, the Court finds there to be a genuine issue of material fact regarding whether the Product Manager position was in existence at the time that Tippie was terminated. Thus, the Court will assume for the purpose of this Motion for Summary Judgment that the Product Manager position was in existence at the time that Tippie was terminated.

13. Tippie contends that the Product Manager position is actually a sales position, which does not require an individual to be an engineer. The Court notes that this argument does not demonstrate that Tippie was qualified for the Product Manager position, but rather attempts to discredit the purported qualifications for that position. As such, the Court will address this argument later in its analysis, because such an argument is more properly entertained in the Court's analysis of pretext.

could conclude that Turtola's selection of Szmulewicz was the result of discrimination upon illegal criteria.

However, the Court will nevertheless assume *arguendo* that there is sufficient evidence to establish a case for discrimination relating to the selection of Szmulewicz for the Product Manager position. As such, the burden falls on Spacelabs to offer a legitimate, nondiscriminatory justification for its actions, which Spacelabs satisfies when it claims that Tippie was terminated as a result of a reduction in force that eliminated her position and that Szmulewicz was the better candidate for the Product Manager position. According to Spacelabs, Szmulewicz was more qualified for the position because he has an engineering degree, while Tippie does not, and because he had greater technical expertise. Thus, the burden shifts back to Tippie to demonstrate that there is a genuine factual question of pretext regarding Spacelabs' proffered reasons. *See Mulhall*, 19 F.3d at 601. At this stage in the proceeding, Tippie must produce significant evidence demonstrating a genuine issue of material fact as to the truth of the reason proffered by Spacelabs for its challenged decision. *Combs*, 106 F.3d at 1529. However, once again, Tippie confuses disagreement about Spacelabs' wisdom in selecting Szmulewicz instead of her, with disbelief about the existence of an honest reason for the adverse employment decision. *Id.* at 1543. It is the job of this Court to determine whether Spacelabs offered an honest explanation of its behavior, but not to sit as a "super-personal department." *Chapman*, 229 F.3d at 1030. Thus, the question for the Court is not whether Szmulewicz was more qualified than Tippie for the Product Manager position, but rather whether Spacelabs' stated reasons for choosing

Szmulewicz are honest explanations of its decision. *See Wavde*, 994 F. Supp. at 1438 n.5.

There is unrebutted deposition and affidavit testimony from Turtola stating why he believed Szmulewicz to be a more qualified candidate than Tippie, and that his decision was not motivated by an improper purpose. First, Turtola believed possessing an engineering degree was a prerequisite for the Product Manager position since all of the employees in a Product Management role in the Latin American division had an engineering degree. Tippie argues that the requirement of earning a degree in engineering is merely a pretext, because the Product Manager position is actually sales manager level position that Tippie is more than qualified to occupy. However, Tippie offers no material evidence to support this argument, while Spacelabs has offered unrebutted evidence that sales are handled by its Area Sales Managers and not the Products Managers. Furthermore, the Court finds no material evidence to suggest that Turtola did not honestly believe that an engineering degree made Szmulewicz more qualified for the position than Tippie. Moreover, the Court finds that an engineering degree to be a reasonable motivation in filling the Products Manager position, because of the technical expertise related to ventilation and anesthesia devices that was necessary for the position.

Second, Szmulewicz was thought to have greater technical experience than Tippie, which would make him a better Product Manager. The Court finds no material evidence to suggest that Turtola did not honestly believe that Szmulewicz's technical expertise was superior to Tippie's technical knowledge. In fact, Tippie conceded during her

deposition that she did not know what Entropy is, while as Product Manager Szmulewicz gives presentations completely devoted to how the company's products relate to Entropy. Moreover, the Court finds that it is a reasonable motivation for filling the Product Manager that the candidate possess technical expertise, since the position required the candidate to be knowledgeable about engineering concepts related to the company's products — such as how the company's products relate to the concept of Entropy.

In sum, Tippie's evidence is insufficient to create a plausible inference of discrimination in light of the evidence that Spacelabs had multiple, legitimate, nondiscriminatory reasons to offer the position to Szmulewicz. In contrast, Tippie fails to provide any material evidence that the decision not to hire her was the result of intentional discrimination in creating the requirements for the Product Manager position. Without providing evidence sufficient to produce a material factual dispute as the Spacelabs' proffered reasons were pretextual, Tippie is unable to create a jury question. See *Wilson*, 376 F.3d at 1090. Accordingly, Spacelabs Motion for Summary Judgment should be granted as it relates to the Product Manager position.

Appendix B

III. CONCLUSION

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Spacelabs Medical, Inc.'s Motion for Summary Judgment [DE 26] is hereby **GRANTED**;

2. This case is hereby **DISMISSED with prejudice**;

3. All pending motions are hereby **DENIED as moot**;

4. The Clerk shall close this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 20 day of July, 2005.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 1, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-14384-FF

STEPHANIE TIPPIE,

Plaintiff-Appellant,

versus

SPACELABS MEDICAL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

Before: BLACK, HULL and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant Stephanie Tipple, is DENIED.

ENTERED FOR THE COURT:

s/ [illegible] Black
UNITED STATES CIRCUIT JUDGE

No. 06-304

In the Supreme Court of the United States

STEPHANIE TIPPIE,

Petitioner,

v.

SPACELABS MEDICAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

> Whether there is a compelling reason for the Court to grant the Petition, where the Eleventh Circuit's unpublished and fact-based decision affirming the District Court's grant of summary judgment was grounded in a rigorous analysis of the undisputed record and applied an articulation of the pretext standard under *McDonnell Douglas* framework recently cited with approval by this Court, and where the decision does not implicate any important federal question that has not been settled by this Court.

With due respect, Petitioner's purported articulation of the questions presented is inappropriate as it is prefaced by and premised on factual contentions that are unsupported by the record evidence. It also mischaracterizes the lower courts' holdings. Specifically, the Eleventh Circuit affirmed the District Court's order granting summary judgment where, contrary to the suggestion in the proposed question, the undisputed evidence established that the decision-maker did make a reasonable and particularized decision regarding Petitioner's relative qualifications for the positions she claims she should have been hired into following the elimination of her position due to a reorganization and reduction in force. Moreover, the Eleventh Circuit applied pretext standards recently cited with approval by this Court. Additionally, the Eleventh Circuit affirmed the District Court's grant of summary judgment on her race discrimination claim because she failed to present any evidence from which it could be found that the decision-maker considered her race in making the personnel decisions at issue.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Spacelabs Medical, Inc.'s parent corporation is Spacelabs Healthcare, Inc., which is traded on the London Stock Exchange. OSI Systems, Inc., is the only publicly held company that owns 10% or more of Spacelabs Healthcare.

TABLE OF CONTENTS

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

COUNTER STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 11

I. Applying Standards Recently Cited With Approval By This Court and Consistent with the Decisions of Other Circuits, the Eleventh Circuit Properly Affirmed the Finding That Petitioner Failed to Demonstrate that the Legitimate, Non-Discriminatory Reasons Articulated by Spacelabs for Not Selecting Her for the Burdick Product Manager Position Were Pretextual. 12

II. The Eleventh Circuit Properly Held, As This Court Has Previously Found, That a Claim Based Purely On National Origin Is Not Cognizable Under § 1981. 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

AKA v. Washington Hospital Center,
156 F.3d 1284 (D.C. Cir. 1998) 14

Ash v. Tyson Foods, 126 S. Ct. 1195 (2006) . . 13, 14, 19

Bisciglia v. Kenosha Unifieid School Dist. No. 1,
45 F.3d 223 (7th Cir. 1995) 20

Bullington v. United Air Lines,
186 F.3d 1301 (10th Cir. 1999) 19

Byrnie v. Town of Cromwell,
243 F.3d 93 (2d Cir. 2001) 18

Cooper v. Southern Co.,
390 F.3d 695 (11th Cir. 2004),
cert. denied 126 S. Ct. 478 (2005) 13, 14

Daemi v. Church's Fried Chicken, Inc.,
931 F.2d 1379 (10th Cir. 1991) 20

Damon v. Fleming Supermarkets of Florida, Inc.,
196 F.3d 1354 (11th Cir. 1999) 15

Fishbach v. D.C. Dept. of Corrections,
86 F.3d 1180 (D.C. Cir. 1996) 19

Kariotis v. Navistar Int'l Transp. Corp.,
131 F.3d 672 (7th Cir. 1997) 15

Lopez v. S.B. Thomas, Inc.,
831 F.2d 1184 (2d Cir. 1987) 20

Magana v. Commonwealth of Northern Mariana Islands,
107 F.3d 1436 (9th Cir. 1997) 21

Millbrook v. IBP,
280 F.3d 1169 (7th Cir. 2002),
cert. denied 537 U.S. 884 (2002) 18

Peters v. Lieuallen,
746 F.2d 1390 (9th Cir. 1984) 18

Raad v. Fairbanks North Star Borough School Dist.,
323 F.3d 1185 (9th Cir. 2003) 13

Rathbun v. Autozone,
361 F.3d 62 (1st Cir. 2004) 18

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2002) 12, 13

Scott v. University of Mississippi,
148 F.3d 493 (5th Cir. 1998) 18

Smith v. Chrysler Corp.,
155 F.3d 799 (6th Cir. 1998) 15, 16

St. Francis College v. Al-Khazraji,
481 U.S. 604 (1987) 19, 21, 22

St. Mary's Honor Center v. Hicks,
509 U.S. 507-508 (1993) 12

Stallworth v. Shuler,
777 F.2d 1431 (11th Cir. 1985) 22

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248 (1981) 12

Statutes

42 U.S.C. § 1981 . . . . . *passim*

Title VII of the Civil Rights Act of 1964, 42 U.S.C.
§ 2000e 1

Florida Civil Rights Act, § 760.10, Fla. Stat. 10

INTRODUCTION

This is not a case which warrants this Court's discretionary review. Petitioner seeks review of a fact-based and unpublished decision of the Eleventh Circuit that affirmed the District Court's summary judgment ruling in favor of Spacelabs Medical, Inc. ("Spacelabs"). Both the Eleventh Circuit and the District Court properly applied well-settled principles applicable to employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII") and 42 U.S.C. § 1981 to undisputed facts of record in a manner consistent with decisions of this Court and other Courts of Appeal.

More particularly, the Eleventh Circuit and the District Court properly held that summary judgment was appropriate in view of the uncontested factual record, which plainly demonstrated that Petitioner failed to establish that Spacelabs' legitimate, non-discriminatory reasons for not selecting her for a position she claims she should have received were pretextual. Indeed, the Eleventh Circuit applied pretext standards recently approved by this Court. Further, the Eleventh Circuit's decision does not give rise to any split among the circuits on the issue of the proper pretext standard or the application of the "honest belief" rule as Petitioner suggests. As the Eleventh Circuit held based on its review of the record, Spacelabs' legitimate, non-discriminatory reasons for selecting the candidate it felt was more qualified for the position at issue were not only honestly held, but were eminently reasonable.

Similarly, there is no pending question or circuit split on the issue of whether a claim based solely on national origin states a claim of race discrimination under § 1981. Rather, this Court has already conclusively answered that question in

the negative, and the Circuit Courts of Appeal have correctly and consistently followed this Court's guidance. Moreover, even if Petitioner's claim of national origin discrimination was cognizable as a claim of race discrimination under § 1981, it was properly dismissed for the same reasons as her other claims of discrimination -- Petitioner's inability to establish a *prima facie* case of discrimination and/or her failure to establish pretext.

Ultimately, Petitioner seeks nothing more than to have this Court independently review and weigh the evidence in this matter. As the Eleventh Circuit's decision both reflects and expressly states, it conducted a thorough review of the evidence in reaching the same conclusion as the District Court: that Petitioner did not satisfy her pretext burden. There is no reason for this Court to review what in the end amounts to a factbound argument concerning the evidentiary record below.

Accordingly, Petitioner has failed to meet her burden of establishing grounds warranting review and the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Respondent Spacelabs Medical, Inc. ("Spacelabs") objects to Petitioner Stephanie Tippie's ("Tippie" or "Petitioner") Statement of the Case because it is factually incorrect, it contains irrelevant material, and it omits facts necessary to a consideration of the questions presented.

I. UNCONTROVERTED FACTUAL BACKGOUND.

A. Tippie's Employment in a Sales Position for Spacelabs.

Spacelabs is a medical equipment business that sells products to hospitals and physicians around the world. (Pet. App. at 12a). Petitioner, who is American, was employed by Spacelabs as a "Key Account Manager" in its Latin American Sales Division beginning in August of 1995. (*Id.*). In that position, her primary responsibility was sales of medical equipment in her designated territory, which for all but the first six months of her employment was limited to Central America and the Caribbean. (Pet. App. at 12a-13a).

B. Spacelabs was Acquired and Petitioner's Position was Eliminated.

In July of 2002, Instrumentarium Corporation acquired Spacelabs. (Pet. App. at 13a). Datex-Ohmeda, a subsidiary division of Instrumentarium, was a direct competitor of Spacelabs. As a result of the acquisition, Instrumentarium had redundant resources in its sales territories in Latin America. (*Id.*). Datex-Ohmeda's Regional Director for Latin America, Jukka Turtola ("Turtola"), was given responsibility for reorganizing and eliminating such redundancies, Turtola made the decision to retain Datex-Ohmeda's sales positions and to eliminate all of Spacelabs' Key Account Manager positions. (*Id.*).

C. The New Burdick Product Line Manager Position for Which Petitioner Was Not Selected.

At the time of the acquisition, there were four people employed as Key Account Managers by Spacelabs: Augusto

DeMelo, who was based in Brazil; Sylvia Hierro-Molino, who was based in Mexico; Facundo Carrillo, who was based in Argentina; and Petitioner, who was based in Ft. Lauderdale, Florida. (*Id.*). After making the decision to eliminate the Key Account Manager positions, Turtola considered these four Spacelabs' employees for newly created positions in the Latin America sales organization. (*Id.*). Turtola had two meetings with the Key Account Managers prior to deciding which, if any, would be offered new positions. (*Id.*). The first meeting was conducted at Datex-Ohmeda's Miami office and all of Spacelabs' Key Account Managers attended in person. (*Id.*). At that meeting, Turtola instructed the Key Account Managers to prepare distributor evaluations to assist him in evaluating Spacelabs' business. (*Id.*). During the second meeting, the Key Account Managers gave presentations regarding the distribution networks they used to sell Spacelabs' products, and Turtola met individually with each of the Key Account Managers. (Pet. App. at 14a). During the meetings, Turtola overheard Petitioner speaking Spanish and concluded, based on his personal observation, that she only had a basic ability to speak the language. (*Id.*).

After the elimination of the Key Account Manager positions, DeMelo was offered the newly created position of Datex-Ohmeda Area Manager for Brazil, as he was located in and already managed sales there. Hierro-Molino was hired by an independent distributor in Mexico, where she was located. (*Id.*). Turtola considered the two remaining Key Account Managers, Carrillo and Petitioner, for the new position of Spacelabs' Burdick Product Line Manager -- a position created to develop Spacelabs' Burdick Cardiology business in Latin America. (Pet. App. at 14a-15a). Turtola ultimately decided to offer the position to Carrillo based on his conclusion that Carrillo was the better qualified candidate. (*Id.*).

In an August 20, 2002 e-mail from Denisse Garcia, an assistant to Turtola, to Holly Borden, Spacelabs' Vice-President for Human Resources, Garcia gave a general description of the selection criteria being applied in the reorganization. These included: "Work History, Sales/Technical Knowledge, Work Ethics, Division's Needs and Requirements, Education, Knowledge of the Area they serviced (Latin America), Knowledge in the business areas required for the future division." (Pet. App. at 14a).

In a subsequent August 27, 2002 e-mail from Turtola to Borden, Turtola offered a more detailed and specific profile of the requirements needed for the Burdick position, noting that the person selected must have the following:

> [S]olid and proven management skills to be able [to] manage a large number of independent distributor companies in the entire Latin America market. The person needs to be able to further develop and build the distribution channel into an independent direction (on a non-exclusive basis) and make the product line grow. The person needs to have a solid understanding of the medical equipment markets overall in Latin America. The person should have a strong knowledge of cardiology and preferably a technical background. As the channel management of the product line will differ substantially from the patient monitoring and anesthesia machine channel to market management, it is extremely important the individual can work relatively independently towards the given goals. Excellent communication skills with the distributors' sales management and sales force are of vital importance to be successful in the job. Native in Spanish language it is an important asset in being able to communicate with the field sales force. Ability to

> communicate in Portuguese is an extra plus and obviously facilitates distributor management in the Brazilian territory.

(Pet. App. at 15a).

The e-mail from Turtola also offered a comparison of Carrillo and Petitioner against the above-stated requirements. Turtola's description of Carrillo was as follows:

> He has a wide knowledge of the Latin American medical equipment market. He has previously run a distributor organization in Argentina and knows what a distributor needs from the principal. He has an excellent combination of technical and clinical know how. He has proved to be able to work extremely well independently. His qualifications as a business manager are highly appreciated in the existing distribution channel. He is native in Spanish and fluent in Portuguese.

(*Id.*). Turtola also offered a description of Petitioner that stated:

> She is very experienced and high-caliber field sales person for medical equipment. She has clinical background which is an important asset in communicating with the end-customers, clinicians and nursing staff. Her strengths are in the area of field sales rather than distributor management and pro-active channel-to-market development. She doesn't have the technical/engineering perspective and understanding of the medical equipment which is elementary. She speaks some basic Spanish but is not

> native. She does not have any command of Portuguese language.

(Pet. App. at 16a-17a).

Based on the above comparison, Turtola decided that Carrillo was best qualified for the Burdick position. (Pet. App. at 17a). In particular, Turtola thought that Carrillo was a better candidate because he possessed firsthand knowledge of running a distributorship in Latin America, given that Carrillo previously worked at a distributor of cardiology equipment for twenty years -- fourteen of which he served as its general manager -- in Latin America. (*Id.*). Turtola did not review Petitioner's experience as comparable, given that it did not include working at or directly running a distributorship in Latin America. Instead, he felt that her primary strength was in sales. (*Id.*). Moreover, Turtola concluded that Carrillo had superior technical and clinical experience relevant to the Burdick position, since his prior experience as general manager for the cardiology equipment distributor included responsibility for technical product service and development, in addition to responsibility for managing product sales. (*Id.*).

Turtola also felt that Carrillo was better suited to the Burdick position from a technical/engineering perspective as he had an education and training in engineering, while Petitioner's education was in respiratory therapy and she came from a clinical background. (*Id.*). Finally, Turtola felt that Carrillo possessed better language abilities relevant to the requirement of the job because Carrillo spoke both Spanish and Portuguese -- the official languages of the countries the Burdick Manager would supervise. (Pet. App. at 17a, 30a). After hearing both candidates speak Spanish, Turtola concluded that Petitioner's Spanish was basic, while Carrillo,

as a native Spanish speaker, possessed a superior ability to communicate. (Pet. App. at 17a). Further, while Carrillo can speak Portuguese, Petitioner cannot. (Pet. App. at 18a n.3).

D. The Senior Product Manager Position for Which Petitioner Was Not Selected.

Petitioner was notified of her termination on August 30, 2002, which was effective September 27, 2002. (Pet. App. at 18a). In mid-September of 2002, Turtola spoke with Jorge Szmulewicz, an independent distributor who had previously worked with Datex-Ohmeda. Szmulewicz indicated to Turtola that he was planning on moving to the United States and was interested in working directly for Datex-Ohmeda. (Pet. App. at 18a, 33a n.12). Szmulewicz, had an electrical engineering degree and particular technical expertise working with ventilation and anesthesia devices. (Pet. App. at 18a). Based upon this specialized technical expertise and his experience, Turtola believed that Szmulewicz would be a valuable addition to Datex-Ohmeda in the position of "Senior Product Manager" for ventilation and anesthesia devices for Latin America. (*Id.*).

One of the requirements to hold such a position at Datex-Ohmeda is an engineering degree. Indeed, all of the employees in a product management role in Datex-Ohmeda's Latin American division were engineers, including the person directly reporting to the Senior Product Manager. (Pet. App. at 18a, 35a). Moreover, as part of his responsibilities in the Senior Product Manager position, Szmulewicz is called upon to prepare and give presentations completely devoted to how the company's products relate to technical concepts such as entropy, an engineering concept with applications related to measuring patient response to anesthesia delivery. (Pet. App.

at 18a, 36a). Unlike Szmulewicz, Petitioner is not an engineer. (Pet. App. at 18a). Further, Petitioner conceded she did not even know what the concept of entropy is. (*Id.*). Further, the Datex-Ohmeda Senior Product Manager is not a position responsible for sales, which are instead handled by the company's "Area Sales Managers" and not individuals like Szmulewicz. (Pet. App. at 1a, 35a). Because Petitioner did not have even the minimum qualifications for the Senior Product Manager position (i.e., an engineering degree), much less the specialized technical expertise Szmulewicz brought to it, Turtola did not consider her for the position.[1]

E. Proceedings And Disposition Below.

Following her termination, Petitioner instituted this action against Spacelabs alleging that it intentionally discriminated against her on the basis of her national origin and gender in

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[1] As the lower courts found, the "factual" assertions upon which Petitioner's arguments below and in her Petition are premised significantly mischaracterize the record evidence and/or are completely devoid of any record support. Such assertions include, but are not limited to, Petitioner's claims that Turtola stated that he failed to select her simply because she was "not native," that Turtola failed to conduct a careful consideration of the candidates, that there was any applicable company policy dictating preference for seniority, that the Senior Product Manager position was merely a sales position, and/or that Petitioner was "more than qualified" to occupy the position. Further, with regard to the Senior Product Manager position, the Eleventh Circuit correctly found that Petitioner failed to make out even a *prima facie* case of discrimination as she could not demonstrate that she met the minimum qualifications for the position, since it was undisputed that she did not have the requisite engineering degree nor sufficient technical knowledge to perform the position. (Pet. App. 8a-9a). Petitioner's arguments in her petition do not challenge that finding.

violation of Title VII and the Florida Civil Rights Act, § 760.10, Fla. Stat., and her race in violation of 42 U.S.C. § 1981. Specifically, Petitioner claimed that Spacelabs intentionally discriminated against her on the basis of her national origin, gender and race when it failed to select her for either the "Burdick Product Line Manager" or "Senior Product Manager" positions. (Pet. App. at 2a).

The District Court granted Spacelabs' motion for summary judgment, holding that Petitioner failed to make out even a *prima facie* case with regard to either position, because she did not establish she met either positions' minimum qualifications. (Pet. App. at 25a-26a, 32a-33a). Nevertheless, assuming *arguendo* that Petitioner had met her *prima facie* burden, the District Court further held she failed to demonstrate that Spacelabs' legitimate, non-discriminatory reasons for failing to hire her for the positions -- that the individuals hired into the positions were better qualified -- were a pretext for discrimination. (Pet. App. at 26a-32a). The District Court also dismissed Petitioner's § 1981 race discrimination claim, since it was premised entirely on her contention that she was not selected because she was American. The District Court held that it stated a claim of national origin discrimination, not race discrimination. (Pet. App. at 12a, n.1).

Petitioner appealed to the Eleventh Circuit, which affirmed the District Court's grant of summary judgment to Spacelabs. (Pet. App. at 1a-16a). The Eleventh Circuit disagreed with the District Court's holdings only in that it found Petitioner had presented enough evidence -- "though not strong" -- to meet her *prima facie* burden with regard to the Product Line Manager position. (Pet. App. at 6a). The Eleventh Circuit nevertheless agreed she had not met even her *prima facie* burden with regard to the Senior Product

Manager position given that she undisputedly lacked an engineering degree or the technical expertise required for that position. (Pet. App. at 6a, 8a-9a). The Eleventh Circuit further agreed with the District Court, based on its independent review of the record, that Petitioner was unable to show that Spacelabs' reasons for not selecting her were pretextual. The Eleventh Circuit held that she could not show her qualifications were so superior to the individual hired that no reasonable person could have selected the individual chosen, and that Spacelabs' reasons for selecting the other person would motive a reasonable employer. The Court also found, contrary to Petitioner's claims that Spacelabs' reasons, were consistent throughout the selection process. (Pet. App. at 8a). The Eleventh Circuit denied Plaintiffs' subsequent petition for rehearing *en banc*. (Pet. App. at 38a).

REASONS FOR DENYING THE PETITION

The decisions below are unpublished, fact-based determinations in which the lower courts applied proper legal standards that neither conflict with a decision of this Court nor of any Court of Appeals. Moreover, the record in this case does not implicate a federal question that either has not been or needs to be decided by this Court. Accordingly, Petitioner has not carried her burden of demonstrating a "compelling reason" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. APPLYING STANDARDS RECENTLY CITED WITH APPROVAL BY THIS COURT AND CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS, THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE FINDING THAT PETITIONER FAILED TO DEMONSTRATE THAT THE LEGITIMATE, NON-DISCRIMINATORY REASONS ARTICULATED BY SPACELABS FOR NOT SELECTING HER FOR THE BURDICK PRODUCT MANAGER POSITION WERE PRETEXTUAL.

The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2002). In order to survive summary judgment where the employer has articulated legitimate, non-discriminatory reasons for the employment decision at issue, the plaintiff must present evidence sufficient to demonstrate "'that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Id.* at 143 (*quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)); *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 507-508 (1993).

Spacelabs met its burden of articulating legitimate, non-discriminatory reasons for selecting Carrillo over Petitioner for the Burdick Product Manager position in Latin America.[2]

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[2] As previously noted, nothing in the petition raises a challenge to the Eleventh Circuit's holding that Petitioner failed even to meet her *prima facie* burden of demonstrating she met the minimum qualifications for the other position referenced in her complaint -- the Senior Product Manager position. Accordingly, Petitioner has waived any argument regarding dismissal of her claims based on

Specifically, Spacelabs considered the person it hired the better candidate for that position because: (1) he had previously worked as a general manager of a distributor of cardiology equipment in Latin America, where he was responsible for technical product service and development in addition to sales; (2) he was educated and trained in engineering, while Petitioner's education came from a clinical background in respiratory therapy; and (3) he had superior language skills because his native language was Spanish and he spoke Portuguese, which Petitioner does not. (Pet. App. at 27a). To survive summary judgment, Petitioner was thus required to adduce sufficient evidence to give rise to an inference that Spacelabs' stated reasons were false and that the true reason she was not selected was intentional discrimination. *See Reeves, supra.*

In rejecting the Petitioner's attempts to show pretext through comparative qualifications, the Eleventh Circuit applied a pretext standard recently approved by the Court in *Ash v. Tyson Foods*, 126 S. Ct. 1195 (2006); (Pet. App. at 8a n.2). In *Ash*, the Court noted that a plaintiff in a comparative qualifications case such as this may be able to raise an inference of pretext from superior qualifications in certain circumstances. Without defining a precise standard, the Court cited with approval various articulations of the proper standard by the lower courts. *Id.* at 1197-98 (*citing Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004), *cert. denied* 126 S. Ct. 478 (2005) (noting that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question"), *Raad v. Fairbanks North Star Borough*

Spacelabs' failure to hire her for that position.

School Dist., 323 F.3d 1185, 1194 (9th Cir. 2003) (holding that qualifications evidence, standing alone, may establish pretext where the plaintiff's qualifications are "clearly superior" to those of the selected applicant;" *AKA v. Washington Hospital Center*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (concluding that the factfinder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job")).

Citing *Ash,* and applying the *Cooper* standard quoted with approval by this Court, the Eleventh Circuit found that Petitioner was unable to show her qualifications were so much better than the individual selected that no reasonable person could have chosen that individual for the position over her. (Pet. App. at 8a). The Eleventh Circuit further found that Petitioner's other attempts to show pretext -- by asserting the decision-making process was unworthy of credence and contained shifting justifications for the adverse employment action -- also failed as "Spacelabs' reasons for selecting Carrillo would motivate a reasonable employer and were consistent throughout the entire process." (Pet. App. at 8a) As the District Court explicitly stated:

> [T]he Court finds that requiring experience managing distributors of cardiology equipment in Latin America to be a reasonable motivation in filling the Burdick position, since the position was created, in part, to develop distribution channels for cardiology equipment in Latin America . . . . the Court finds requiring technical experience and an education in engineering to be reasonable motivations for filling the Burdick position . . . the Court finds that requiring the ability to speak Spanish and Portuguese are reasonable motivations for filling the Burdick position, since these languages are the official languages of the

> countries over which the Burdick Manager would supervise.

(Pet. App. at 28a-30a). The District Court found, and the Eleventh Circuit affirmed, "there is no evidence that these have ever changed." (Pet. App. at 31a n.11).

Petitioner now claims that review of the Eleventh Circuit's decision is warranted to resolve a conflict between the circuits concerning applications of the honest belief rule in the summary judgment context. The honest belief rule provides that "so long as the employer honestly believed in the proffered reason, an employee cannot prove pretext even if the employer's reason in the end is shown to be mistaken, foolish, trivial, or baseless." *See Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677-78 (7th Cir. 1997). While most circuits have strictly applied the honest belief rule, finding that "an employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct," *see Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1363 n. 3 (11th Cir. 1999), *Kariotis*, 131 F.3d at 677 ("arguing about the accuracy of the employer's assessment is a distraction [internal citation omitted] because the question is not whether the employer's reasons for a decision are 'right but whether the employer's description of its reasons is honest'") (quoting source omitted), the Sixth Circuit has suggested that employers seeking to avail themselves of the honest belief rule should be required to show that their decision was "reasonably based on particularized facts." *See Smith v. Chrysler Corporation*, 155 F.3d 799, 807 (6th Cir. 1998).

Here, Petitioner's claims were not barred by an application of the honest belief rule. As the District Court

found and the Eleventh Circuit affirmed, the Petitioner did not offer any evidence that the proffered reasons that Spacelabs chose to hire Carrillo instead of the Petitioner -- his experience in working for and running a distributor of cardiology products in Latin America, his greater technical training and experience and his superior language abilities -- were mistaken, foolish, trivial or baseless. This is not a case where Spacelabs had an honest, but inaccurate, belief about any of these criteria. To the contrary, as the District Court found, there was unrebutted evidence that Carrillo had greater experience working for and running a cardiology equipment distributor in Latin America, that he had greater technical training and had greater language skills because he spoke both Spanish and Portuguese. Furthermore, Tippie offered no evidence that her qualifications were comparable, much less superior. Consequently, the honest belief rule, and thus any question regarding the proper application of that rule, are irrelevant.

Further, even though the Eleventh Circuit's decision did not rest on an application of the honest belief rule, both its decision and that of the District Court would satisfy the test which Petitioner suggests should be adopted under that rule. Specifically, Petitioner contends that an employer should only be permitted to rely on the honestly held belief rule where its is reasonably based on particularized facts. (Pet. Br. at 25 (*citing Smith, supra*)). Petitioner's argument utterly ignores that both the Eleventh Circuit and the District Court correctly found that Spacelabs' hiring decision for the Burdick Product Manager position was reasonable and based on particularized facts. In particular, both the Eleventh Circuit and the District Court not only found that Petitioner failed to present any evidence giving rise to an inference that the decision-maker did not honestly believe the reasons underlying his determination that Petitioner was not the best qualified

candidate, but also expressly found that the reasons were particularized and reasonable. (Pet. App. at 8a, 28a-32a).

Indeed, Petitioner's contention that Spacelabs failed to make a reasonable or particularized determination is undercut by the undisputed record evidence upon which the lower courts' decisions were based. As she did before the lower courts, Petitioner grossly misstates the record in her attempts to support her arguments. She misleads the Court by suggesting that the record evidence supports a finding that the decision-maker failed to look at or consider Petitioner's background and that his decision was not well informed. (Pet. Br. at 24). In reviewing the actual record, the courts below properly rejected this contention, finding that the decision-maker's e-mail describing his selection decision demonstrates that he obviously did look into and consider Petitioner's background as shown by his particularized discussion of her qualifications, including but not limited to her educational background (in respiratory therapy) and her experience (clinical). (Pet. App. at 16a-17a). Further, while Petitioner argues that the decision-maker should have noticed in her personnel file a reference to the fact that she was trained in Spanish translation 30 years earlier, that fact does not support a finding that the decision-maker failed to make a particularized determination of the comparative Spanish language skills of Petitioner and the person he selected after having heard them both speak Spanish.[3]

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[3] Underlying Petitioner's arguments are numerous other mischaracterizations of the record, including in regard to her comparative experience and language skills, that the lower courts also considered and properly rejected. For example, Petitioner claims that the decision-maker admitted she had the same experience "running distributor networks." (Pet. Br. at 16). As the decision-maker noted, however, there is a significant distinction

Petitioner's argument regarding the honest belief rule is thus nothing more than a red-herring. The Eleventh Circuit and District Court's decisions were premised on the well-settled principle that in cases such as this, where pretext arguments are ultimately premised on comparative qualifications, "the court must respect the employer's unfettered discretion to choose among qualified candidates ... (and not to act as a super personnel department that second guesses employers' business judgments)." *See Byrnie v. Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001) (citation omitted); *Rathbun v. Autozone*, 361 F.3d 62, 74 (1st Cir. 2004) (same); *Scott v. University of Mississippi*, 148 F.3d 493, 509 (5th Cir. 1998) (same); *Peters v. Lieuallen*, 746 F.2d 1390, 1393 (9th Cir. 1984) (same); *Millbrook v. IBP*,

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between (1) running distributor networks as a manufacturing company's sales representative and (2) working directly for and running a distributor in Latin America as a general manager. While Petitioner had comparable experience in the first category, it is undisputed she had none in the second. In contrast, the individual selected for the position undisputedly had more than 14 years of such experience working in Latin American for a distributor of cardiology equipment, in addition to having a formal education and background in engineering that Petitioner also undisputedly lacked. (Pet. App. at 29a, 33a). Further, while Petitioner notes that she spoke Portunal (allegedly a hybrid dialect consisting primarily of Spanish and a few words in Portuguese), it is undisputed that she did not actually speak Portuguese while the person selected did. As it was entirely reasonable for Spacelabs to select someone who was able to speak the official language (whether fluently or conversationally) -- rather than Petitioner who could merely speak a hybrid consisting of only a few words of the language -- the lower courts properly rejected Petitioner's pretext argument premised on her comparative language skills.

280 F.3d 1169, 1181 (7th Cir. 2002), *cert. denied* 537 U.S. 884 (2002) (same); *Bullington v. United Air Lines*, 186 F.3d 1301, 1318 n.14 (10th Cir. 1999) (same); *Fishbach v. D.C. Dept. of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (same). Petitioner ignores this because she is unable to directly attack the lower courts' findings that she utterly failed to demonstrate that her qualifications were superior. Under *Ash* and the decisions of every circuit court that has addressed pretext in the context of comparative qualifications, that is simply not enough to establish pretext. Instead, Petitioner was also required to adduce evidence establishing that her qualifications were not only objectively superior, but significantly so. *See Ash*, *supra*. Because Petitioner failed to present evidence that she was as qualified as the individual selected, much less that her the qualifications were so superior as to give rise to an inference of pretext, the Eleventh Circuit properly affirmed the District Court's dismissal of her discrimination claims. (Pet. App. at 8a, 30a-32a).

II. THE ELEVENTH CIRCUIT PROPERLY HELD, AS THIS COURT HAS PREVIOUSLY FOUND, THAT A CLAIM BASED PURELY ON NATIONAL ORIGIN IS NOT COGNIZABLE UNDER § 1981.

Petitioner frivolously argues that the Court should exercise review to determine whether a claim based exclusively on national origin discrimination necessarily states a claim of race discrimination under § 1981. Petitioner's argument is frivolous because it ignores that this Court has already answered that question, correctly finding that it does not. *See St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987). Indeed, the Court in *St. Francis* expressly noted that in order to state a cognizable claim under § 1981, a plaintiff must do more than allege she was discriminated against based solely

on the place or nation of her origin. She must instead show at a minimum that she was discriminated against based on her ancestry or ethnic characteristics. *Id.* ("If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, **rather than solely on the place or nation of his origin**, or his religion, he will have made out a case under § 1981.") (emphasis added).

Contrary to Petitioner's suggestion, the Courts of Appeal have consistently and uniformly followed this Court's guidance in holding that claims which implicate discrimination on the basis of ancestry or ethnic characteristics are cognizable under § 1981, while claims premised exclusively on an individual's birthplace do not fall within § 1981's coverage. In particular, the courts have not widely assumed that claims of national origin discrimination and claims of race are mutually exclusive as Petitioner claims. Rather, as the cases Petitioner cites illustrate, the courts have merely consistently required that claims of national origin discrimination be tied to evidence of discrimination on the basis of ancestry or ethnicity to state a cognizable claim of race discrimination under § 1981. *See Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1387 n.7 (10th Cir. 1991) (noting that § 1981 does not prohibit national origin discrimination per se, but that it covered claims of discrimination based on the plaintiff's Iranian descent because such claims implicated plaintiff's ancestry and/or ethnic characteristics); *Bisciglia v. Kenosha Unified School Dist. No. 1*, 45 F.3d 223, 230 (7th Cir. 1995) (finding claim of discrimination based on Italian descent actionable because at the time § 1981 was adopted, "Italians" constituted group of people with similar characteristics and thus an identifiable "race" that Congress intended to protect) (citations omitted); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir.

1987) (finding § 1981 covered allegation of discrimination based on Puerto Rican descent given implications of discrimination on the basis of ancestry or ethnic characteristics); *Magana v. Commonwealth of Northern Mariana Islands*, 107 F.3d 1436, 1446-47 (9th Cir. 1997) (finding § 1981 coverage given that plaintiff alleged discrimination because of race based on being Filipino and being treated less favorably than Caucasians and noting claims were thus not based solely on plaintiff being from the Philippines).

Consistent with this Court's holding in *St. Francis* and the decisions of the Courts of Appeal that have uniformly followed that holding, the Eleventh Circuit upheld the dismissal of Petitioner's § 1981 claim because it was premised entirely on her national origin. While some claims asserting national origin discrimination may be closely tied to and thus necessarily implicate issues of ancestry and ethnicity that would support a claim of discrimination on the basis of race under § 1981, Petitioner's claim that she was discriminated against because she was American does not.[4] Being American does not implicate inclusion in any particular "ethnically nor physiognomically distinctive sub-group" and there is nothing

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[4] In her charge of discrimination filed with the Equal Employment Opportunity Commission, Petitioner notably failed to identify race as a basis upon which she believed she was discriminated against. When asked at her deposition to identify the grounds upon which she believed she was discriminated against, she responded by stating, "Gender, nationality, religion, age." Further, when later specifically questioned at her deposition about the basis of the § 1981 race claim in her complaint, she testified that to the extent she believed she was discriminated against on the basis of her race at all, it was because she was "American." She thus did not allege that it was because of her race, which she identified as Caucasian.

in the history or context of § 1981 that would suggest that Congress considered "Americans" to be a racial classification to which the statute was addressed. *See St. Francis*, 481 U.S. at 611-612 (noting historical definitions of race at its broadest tied to common ancestry or ethnic characteristics). Petitioner's status as an American is related to her national origin, not her race, and her claims under § 1981 that were premised on her being American and thus "not native" were properly dismissed as they did not state a claim under § 1981. Moreover, as the Eleventh Circuit found based on the record, there is no support for Petitioner's contention that the decision-maker expressed a preference for a native person of Argentina.[5] (Pet. App. at 4a (noting that, "Taken in context, [the decision-maker's] use of the phrase 'not native' was a manner of describing [Petitioner's] Spanish language abilities, not her national origin.")).

Finally, even if Petitioner's claim of national origin discrimination was cognizable under § 1981, it was nevertheless properly dismissed. This follows from the fact that claims under § 1981 are subject to the same burden shifting analysis as claims under Title VII. *See Stallworth v. Shuler*, 777 F.2d 1431, 1433 (11th Cir. 1985) (noting that § 1981 claims are evaluated under the same *McDonnell Douglas* standards applicable to Title VII claims). Accordingly, even if cognizable, Petitioner's § 1981 claims

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[5] Notably, Argentina's population is primarily ethnically Caucasian and largely of European ancestry. *See The World Fact Book 2006*, Central Intelligence Agency, Office of Public Affairs, 2006. Petitioner failed to adduce any evidence to suggest that the decision-maker considered her ethnicity or ancestry, and she also failed to adduce evidence establishing her ethnicity or ancestry were different from the individuals selected for the positions she claims she should have received.

fail for the same reasons as her Title VII claims -- her inability to establish a *prima facie* case of discrimination given her lack of minimum qualifications for the positions at issue, and/or her failure to establish that Spacelabs' legitimate, non-discriminatory reasons for failing to hire her for those positions were pretextual. Petitioner thus fails to state a compelling reason to grant review on the issue of the dismissal of her claims of race discrimination under § 1981.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests the Petition for Certiorari be denied.

Respectfully submitted this 13th day of November, 2006.

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